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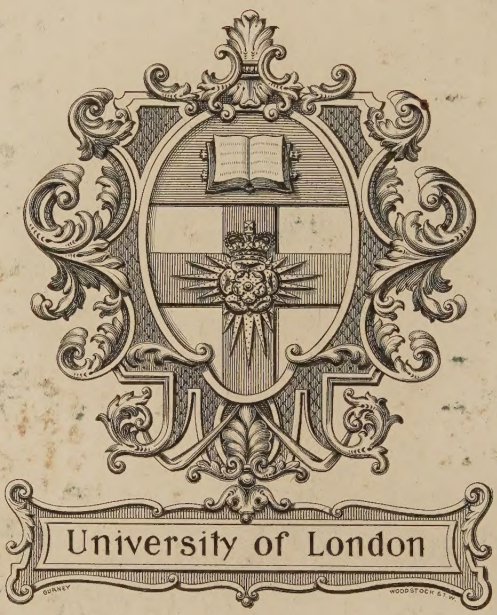

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DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

AND BY THE

RAILWAY AND CANAL COMMISSION.

1903. 1904.

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ed. STEWART *v.* CHAPMAN.
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[IN THE COURT OF APPEAL.]

1903
Oct. 28.

THE GOLDSMITHS' COMPANY *v.* THE WEST METROPOLITAN RAILWAY COMPANY.

Lands Clauses Acts—Compulsory Powers—Duration of Powers under Special Act—"Three Years from the passing of this Act"—Exclusion of Day on which Act received Royal Assent.

Under a special Act, which incorporated the Lands Clauses Act, 1845, a railway company were empowered to take lands compulsorily for the purpose of their undertaking, and the powers of the company for this purpose were to cease after the expiration of three years from the passing of the Act. The Act received the Royal assent on August 9, 1899, and on August 9, 1902, the company gave to the plaintiffs a notice to treat for the purchase of lands belonging to them and scheduled in the special Act. On an application for an injunction to restrain the company from proceeding under this notice:—

Held, that the day of the passing of the Act must be excluded in the computation of the three years, and that the notice was served in time.

APPEAL from an order of Walton J. at chambers.

The action was brought for an injunction to restrain the

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defendants from acting upon a notice alleged to have been served upon the plaintiffs upon August 9, 1902. The West Metropolitan Railway Act, 1899, which incorporated the Lands Clauses Acts, empowered the defendant company to take compulsorily certain lands for the purposes of their undertaking, including land of which the plaintiffs were owners. By s. 29 of the defendants' Act it was enacted that "the powers of the company for the compulsory purchase of lands for the purposes of this Act shall cease after the expiration of three years from the passing of this Act." The statute 33 Geo. 3, c. 13, enacts that the Clerk of the Parliaments shall indorse on every Act of Parliament the date when it shall have passed and shall have received the Royal assent, and such endorsement shall be taken to be a part of such Act, and to be the date of its commencement, where no other commencement shall be therein provided. The defendants' Act received the Royal assent on August 9, 1899, and that date was duly indorsed upon it. A notice to treat for the purchase of a part of the land of the plaintiffs which was scheduled in the defendants' Act was served by them upon the plaintiffs. There was a dispute as to the exact date on which this notice was served, but for the purposes of this case it was taken that the notice was served on August 9, 1902. By this action the plaintiffs sought to restrain the defendants from acting upon the notice, and for a declaration that it was not served in due time, on the ground that at the date of the service the power of the defendants, under their Act, to take land compulsorily had come to an end. After the commencement of the action the plaintiffs applied at chambers for an interim injunction, or, in the alternative, that the question of law whether the notice, assuming it to have been served on August 9, 1902, was served in time should be set down for hearing before the trial. Upon the hearing of this application the parties agreed to treat it as the hearing of the preliminary point of law. The learned judge consented to this course being taken, and decided, in favour of the defendants, that the notice was served within the time limited by the defendants' Act.

The plaintiffs appealed.

S. A. T. Rowlatt (*St. J. G. Micklethwait* with him), for the plaintiffs. The notice to treat, served on the third anniversary of the passing of the Act, was out of time. Formerly an Act that was to take effect from its passing related back to the first day of the session: *Latless* v. *Holmes* (1), a case that probably led to the passing of the Act 33 Geo. 3, c. 13. Under that statute the date of the commencement of the Act was August 9, 1899, the day on which it received the Royal assent. The powers of the defendants came into operation on that day, and, as pointed out by Sir William Grant in *Lester* v. *Garland* (2), our law rejects fragments of a day, so that the defendants' powers must be taken to have been effectual during the whole of that day, and the notice was out of time because it was not delivered within three years.

There is a distinction drawn in the cases between a term created which commences with the first day of the term, as in the case of a lease, and a time limited from a fixed date for the doing of an act. In the latter case the first day is excluded, as in the case of an act of bankruptcy arising by reason of the sheriff holding goods that he has seized for twenty-one days. In that case the first day is necessarily excluded in order to give the full period allowed: *In re North, Ex parte Hasluck.* (3) In letters patent granted for a term the day of the date of the grant is reckoned in the term: *Russell* v. *Ledsam.* (4) No question as to this distinction can really arise where, as in this case, a start is made from a day fixed by law, and that day should therefore be included in the time limited by the Act. [He cited also *Tomlinson* v. *Bullock.* (5)]

Mulligan, K.C., and *A. F. C. Luxmoore*, for the defendants. The expression "passing of the Act" is equivalent to naming the day on which the Royal assent was given: *Ex parte Rashleigh, In re Dalzell.* (6) The term allowed during which the powers of the company as to acquisition of land may be exercised is three years, and the time from which that period

(1) (1792) 4 T. R. 660.
(2) (1808) 15 Ves. 248, at p. 257; 10 R. R. 68.
(3) [1895] 2 Q. B. 264.
(4) (1845) 14 M. & W. 574.
(5) (1879) 4 Q. B. D. 230.
(6) (1875) 2 Ch. D. 9.

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is to run is from August 9, 1899. To give the full period that day must not be computed in the three years. The Interpretation Act, 1889 (52 & 53 Vict. c. 63), by s. 36 enacts that the commencement of an Act is to mean the time at which it comes into operation; but the terms "passing of the Act" and "commencement of the Act" are not synonymous. The principle relied on is illustrated in the case of a patent "to cease at the expiration of three years" from the date of the patent unless a condition should be complied with: *Williams* v. *Nash* (1); and in the case of an interval of "not less than fourteen days" between meetings of a company: *In re Railway Sleepers Supply Co.* (2) If in this case one day were substituted for three years the effect of the argument for the plaintiffs would be, not to give a day, but only to give the portion of it between the time when the Royal assent was given and midnight.

[They cited also *South Staffordshire Tramways Co.* v. *Sickness and Accident Assurance Association, Ld.* (3)]

S. A. T. Rowlatt, in reply.

COLLINS M.R. In my opinion this appeal fails. No doubt the distinction is somewhat fine between a term created within which an act may be done, and a time limited for the doing of an act; but I think that, though fine, it is well established. The principle was laid down by Parke B. in *Russell* v. *Ledsam* (4), in which renewed letters patent were granted after the expiration of the term of fourteen years granted by the first letters patent, and the question was whether the day of the date of the first letters patent was included or excluded. On this point the learned judge said: "The usual course in recent times has been to construe the day exclusively, whenever anything was to be done in a certain time after a given event or date; and consequently the time for enrolling a specification within the six months given by the proviso is reckoned exclusively of the day of the date: and many other instances are collected in the cases of *Webb* v. *Fairmaner* (5) and *Young*

(1) (1859) 28 Beav. 93.
(2) (1885) 29 Ch. D. 204.
(3) [1891] 1 Q. B. 402.
(4) 14 M. & W. 574, at p. 582.
(5) (1838) 3 M. & W. 473; 49 R. R. 690.

v. *Higgon*. (1) But in this case the question is when the term given by the patent commences; and the same rule would apply as to the commencement of a term, which, if it is to run from the date of the lease, includes the day of the date."

In the case before us the Act says that the power of the company for the compulsory purchase of lands is to cease "after the expiration of three years from the passing" of the Act. One thing that may be done in exercise of those powers is the giving of a notice to treat, and the time limited within which that can be effectually done is three years from the passing of the Act. It appears to me that no distinction can be drawn between the day determined by the passing of the Act, and any other day from which time might be reckoned. If this view is correct, then the day from which the period is to run must be excluded in computing the three years. In *In re North, Ex parte Hasluck* (2), Rigby L.J. seems to have taken the wide view that the question of whether the day on which the act is done is to be included or excluded must depend on whether it is to the benefit or disadvantage of the person primarily interested. Without saying whether it is necessary to go that length, it seems to me that the authorities carry us to the full extent of the decision of Walton J., and that the appeal must be dismissed.

MATHEW L.J. The true principle that governs this case is that indicated in the report of *Lester* v. *Garland* (3), where Sir William Grant broke away from the line of cases supporting the view that there was a general rule that in cases where time is to run from the doing of an act or the happening of an event the first day is always to be included in the computation of the time. The view expressed by Sir William Grant was repeated by Parke B. in *Russell* v. *Ledsam* (4), and by other judges in subsequent cases. The rule is now well established that where a particular time is given, from a certain date, within which an act is to be done, the day of the date is to be excluded.

(1) (1840) 6 M. & W. 49.
(2) [1895] 2 Q. B. 264.
(3) 15 Ves. 248; 10 R. R. 68.
(4) 14 M. & W. 574.

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In this case a time is prescribed within which notices to treat for the acquisition of land can validly be given. The power to do this is to cease after the expiration of three years from the passing of the Act—that is, after three full years from August 9, 1899. I agree that the judgment of the learned judge must be supported, and the appeal dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Freshfields.*

Solicitors for defendants: *Biggs-Roche, Sawyer & Co.*

A. M.

1903 *Nov.* 2.

[IN THE COURT OF APPEAL.]

CHARLES BRIGHT & CO., LIMITED *v.* SELLAR.

Practice—Order of High Court—Error in Law apparent on face of Order—Action to review—Jurisdiction of High Court to review.

Since the passing of the Judicature Act, 1873, the High Court has no jurisdiction to review its own order, in an action brought to review the order on the ground of error in law apparent on the face of it, the remedy of the party complaining being by appeal to the Court of Appeal.

APPEAL from the judgment of Wright J. upon a point of law raised by the pleadings and set down for hearing under Order XXV., r. 2.

On November 28, 1901, Sellar, the defendant in the present action, recovered judgment for 2537*l.* 10*s.* 2*d.* in an action in the King's Bench Division brought by him against Charles Bright & Co., Limited, the plaintiffs in the present action. On December 2 of the same year application was made in that action for a charging order nisi, which recited the recovery of judgment and that the defendants were still indebted to the plaintiff in the sum recovered, and that there was standing in the name of Charles Hudson Bennett, on behalf of the defendants, 7000 fully paid shares of 1*l.* each in Bright's Light and Power Company, Limited, and that the said Charles Hudson Bennett also held on behalf of the defendants six 5 per cent. debentures of 100*l.* each of the Buenos Ayres Electric Tram-

ways Company, Limited, and a sum of 623*l.* 8*s.* 9*d.* cash, and ordered that "unless sufficient cause be shewn to the contrary . . . . the defendants' interest in the said shares, debentures, and cash so standing and held as aforesaid shall, and in the meantime do, stand charged with the payment of the above-mentioned amount due on the said judgment." On the 20th of the same month the charging order was made absolute, but the debentures mentioned in the order nisi were omitted from the order absolute, which charged only the defendants' interest in the shares and cash with the payment of the amount due on the judgment.

No appeal was brought against this order, but in July, 1902, the present action was brought by the liquidator of the company, in the name of the company, which in the meanwhile had gone into liquidation, to review the order on the ground that upon its face it was erroneous in law, so far as it purported to create a charge upon the sum of 623*l.* 8*s.* 9*d.* cash mentioned in it, and the plaintiffs claimed that the order should, so far as it purported to create a charge on that sum, be discharged.

The defendant in this action pleaded that the statement of claim was bad in law and disclosed no cause of action, by reason that no grounds were set forth in it entitling the plaintiffs to bring any such action, and that the plaintiffs were estopped by the charging order from making the claim set up in the statement of claim.

An order was made that the point of law raised by the pleadings should be heard before the trial of the action, and the case came on for argument before Wright J. The learned judge decided that, assuming the charging order on the face of it to be bad in law, this action to review it would not lie, since an appeal could have been brought against the order. He further held that an action to review could only be brought in the case of a judgment finally determining the rights of the parties, and that the order that it was sought to review was not such a judgment. He accordingly gave judgment for the defendant.

The plaintiffs appealed.

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Oct. 26. *C. A. Bennett*, for the plaintiffs. The jurisdiction that the Court of Chancery possessed before the Judicature Acts to entertain a bill of review is still in force in the High Court with the substitution of an action for a bill of review: *Falcke* v. *Scottish Imperial Insurance Co.* (1), *Boswell* v. *Coaks* (2), and *Scott* v. *Alvarez.* (3) Before the Judicature Acts the Court of Chancery would have reviewed an order or decree if it appeared on the face of it to be bad in law, or if fresh facts had been discovered, or in case of fraud; though an application to set aside a judgment on the ground of fraud may not be properly described as an application to review. The application to review could only be made after the decree or order had been enrolled, but the doing away with the necessity for enrolment does not affect the question of jurisdiction. It would have been no answer to an application to review that no appeal had been prosecuted before the enrolment of the decree or order. The High Court can now review any judgment or order that is bad in law on the face of it. The law is stated in Smith's Chancery Practice, 5th ed. p. 475, to be that if a party seeks to reverse a decree which has been signed and enrolled upon error apparent, or on new facts, he files a bill of review. In 2 Daniell's Chancery Practice, 7th ed. p. 1287, it is stated that "an action of review is only proper where a judgment has been given finally determining the rights of the parties." *Noble* v. *Stow* (4), which is cited in support of the statement that there must have been a final determination, does not support it. At any rate, in this case the order did finally dispose of the rights of the parties. The order was bad on the face of it because it purported to charge cash in the hands of a third party, and was therefore contrary to a statutory enactment: *Green* v. *Jenkins.* (5) The Judgments Act, 1838 (1 & 2 Vict. c. 110), as amended by the Judgments Act, 1840 (3 & 4 Vict. c. 82), does not authorize the making of a charging order on cash in the hands of a third party. Sect. 14 of the first Act allows of a charge

(1) (1887) 57 L. T. 39; 35 W. R. 794.
(2) (1894) 6 R. 167.
(3) [1895] 1 Ch. 596.
(4) (1859) 29 Beav. 409.
(5) (1860) 1 D. F. & J. 454.

being made on stock or shares of a public company standing in the name of a judgment debtor, or of any person in trust for him, and s. 1 of the second Act extends this to the dividends, interest, or annual produce of such stocks or shares. There is no authority to make a charge upon cash other than the dividends or annual produce of stock or shares. The dividends when they have come into the hands of a third person cease to be dividends, and can only be reached by a garnishee order. Only dividends in the hands of the company and not paid over can be subject to a charge, and s. 15 of the first Act shews that this must be so, for it provides for notice to the company acting as a restraint on transfer. There was, therefore, error on the face of the order, and an action to review is maintainable.

Alan Macpherson, for the defendant. In *Scott* v. *Alvarez* (1) attention does not seem to have been directed to the decision of Jessel M.R. in *In re St. Nazaire Co.* (2) In that case it was pointed out that the effect of allowing such an action as this would be practically to extend the time for an appeal beyond that given by the Judicature Acts. Even if an exception were to be made in the case of error appearing on the face of the judgment or order, no such error appears in this case. There is nothing to shew that the cash mentioned in the order is not dividends or annual produce of the shares. The limitation suggested as arising out of s. 15 of the first Act is based merely on directions as to notice, and cannot have the effect of limiting the operation of the Act. Any person in whose hands money representing dividends or annual produce of shares is found would be bound by notice of a charge. So far as the remedy by action of review for disobedience to a statute exists, it can only be available where there is clearly disobedience of or non-compliance with a plain direction. The most that could be said here is that something has been added to the order which, on argument, might turn out to be unauthorized; but that is quite different from matter which is prohibited by statute.

(1) [1895] 1 Ch. 596. (2) (1879) 12 Ch. D. 88.

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C. A. Bennett, in reply, referred to *Robinson* v. *Peace* (1) and *Brereton* v. *Edwards*. (2)

Cur. adv. vult.

Nov. 2. The judgment of the Court (Collins M.R., Mathew L.J., and Cozens-Hardy L.J.) was read by

COZENS-HARDY L.J. This appeal raises a curious and important question as to the jurisdiction of a judge of the High Court to review and discharge an order of the High Court. On November 28, 1901, the defendant Sellar recovered judgment against the plaintiff company in an action in the King's Bench Division for 2537*l.* 10*s.* 2*d.*, and he obtained a charging order in that action by which the company's interest in certain shares standing in the name of one Bennett on behalf of the company in Bright's Light and Power Company, Limited, and a sum of 623*l.* 8*s.* 9*d.* held on behalf of the company by Bennett, were charged with the payment of the amount due on the judgment. The order nisi also purported to charge certain debentures, but the word "debentures" was omitted in the order absolute, with which alone it is necessary to deal.

This action was commenced on July 14, 1902, and the claim alleges that the order is erroneous in law in so far as it purports to create a charge upon the cash in the hands of Bennett, and it asks that the order may be reviewed and discharged to that extent. It is argued that the charge on the cash was not authorized by the Judgments Act, 1838, as amended by the Judgments Act, 1840, and that the error is of such a nature as would have supported a bill of review in the old Court of Chancery, and that the relief which might have been obtained by means of such a bill ought now to be given by action. Wright J. has held that the action cannot be maintained, and from his decision this appeal is brought.

It may be assumed for the present purpose, but without deciding it, that the charging order was not justified by the statutes, and that the error is apparent on the face of the

(1) (1838) 7 Dowl. 93. (2) (1888) 21 Q. B. D. 488.

order. It is important to remember that in the Court of Chancery, until comparatively modern times—that is to say, until the reign of Charles II.—there was no appeal from the Lord Chancellor to any higher tribunal, but an opportunity was afforded of correcting decisions by means of a rehearing, which might be before the same or any other judge. This right of rehearing could, however, only be exercised before a decree or order had been enrolled, up to which time it was not considered to be, in the full sense of the term, a record of the Court. If an enrolled order was bad on the face of it, a means existed for correcting such an order by a bill of review. It will be sufficient to refer to one of Lord Bacon's orders in Chancery dealing with this subject-matter: "No decree shall be reversed, altered, or explained, being once under the great seal, but upon bill of review; and no bill of review shall be admitted except it contain, either error in law appearing in the body of the decree, without further examination of matters of fact, or some new matter which hath risen in time after the decree, and not any new proof which might have been used when the decree was made; nevertheless, upon new proof that is come to light after the decree made, and could not possibly have been used at the time when the decree passed, a bill of review may be grounded by the special licence of the Court, and not otherwise": see Beames's Chancery Orders, 1. It was, however, well settled that, if there was error apparent on a decree or order which was not enrolled, neither a bill of review nor a supplemental bill in the nature of a bill of review could be maintained, but the investigation of the matter must be brought on by a petition of rehearing: see Mitford on Pleading, 5th ed. p. 108. Now, in the present case, the order absolute has not been enrolled. The procedure by bill of review, therefore, could not have been applied under the old system. A petition of rehearing might have been presented, but that would have been the only remedy. Now, it has been held that since the Judicature Act no judge of the High Court has jurisdiction to rehear, such jurisdiction being essentially appellate: *In re St. Nazaire Co.* (1)

(1) 12 Ch. D. 88.

C. A. 1903

CHARLES BRIGHT & Co., LIMITED v. SELLAR

Cozens-Hardy L.J.

It seems to follow logically from what has been said that the High Court has now no jurisdiction to review its own order on the ground of apparent error, by means of an independent action, and that the party complaining must come to the Court of Appeal. The convenience of this view is obvious. If an appeal is presented within the reasonably short time allowed by the general orders no question will arise. If, as in the present case, the party complaining allows the time limited to pass by, the Court of Appeal has still full power to enlarge the time: see Order LVIII., r. 15. Subject to proper conditions and under special circumstances, the Court of Appeal would extend the time. But in considering an application for extension regard would be had to any laches or delay on the part of the applicant, and to what, if anything, had been done under or in reliance upon the order sought to be discharged. There is no authority binding this Court opposed to the above view. Doubtless there is ample jurisdiction now to deal by fresh action with some matters which were formerly the subject of a bill of review, or of a supplemental bill in the nature of a bill of review. For instance, where a judgment has been obtained by fraud, *Birch* v. *Birch* (1), or where fresh material evidence has been obtained since the judgment which could not have been previously procured, *Boswell* v. *Coaks* (2), an action may be maintained. Actions of this nature do not invite the High Court to rehear upon the old materials. Fresh facts are brought forward, and the litigation may be well regarded as new and not appellate in its nature, because not involving any decision contrary to the previous decision of the High Court. Reliance was naturally placed upon the observations of Kay J. in *Falcke* v. *Scottish Imperial Insurance Co.* (3), to the effect that the old jurisdiction of the Court of Chancery to allow a bill of review is not affected by the Judicature Acts. The learned judge was dealing with an application for leave to bring a fresh action on the ground of the discovery of a new and material document. It was a case falling within the second branch of Lord Bacon's order. His decision that such

(1) [1902] P. 130. (2) 6 R. 167.
(3) 57 L. T. 39; 35 W. R. 794.

an action may be maintained was quite correct, though it can scarcely be contended, since the judgment of the House of Lords in *Boswell* v. *Coaks* (1), that the leave of the Court is now necessary. If, however, the dictum is taken as an assertion that all the old jurisdiction of the Court of Chancery with respect to bills of review, including the jurisdiction to discharge an order on the ground of error apparent on the face of the order, is now vested in the High Court, we think it cannot be supported.

It follows that in our opinion this appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for plaintiffs: *Bennett & Chance.*
Solicitor for defendant: *W. J. Hunter.*

A. M.

HARRIS AND ANOTHER *v.* HICKMAN.

1903
Nov. 3.

Landlord and Tenant—Yearly Tenancy—Covenant by Tenant to pay Outgoings—Defective Drain—Reconstruction of—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *ss.* 3, 4.

The owners of a house let it to the defendant for a term of three years at a rent of 70*l.*, the defendant agreeing to pay all "rates, taxes, assessments, and outgoings whatsoever in respect of the said premises." After the expiry of the term the defendant continued in occupation of the house without any fresh agreement, and paid rent for it at the same rate. Subsequently, and whilst the defendant was still in occupation, the sanitary inspector of the district served upon the owners of the house an intimation under s. 3 of the Public Health (London) Act, 1891, that the house was in such a state as to be a nuisance owing to the drain being defective. The owners gave notice to the defendant, and required him to do the work necessary to abate the nuisance. Upon the defendant refusing to do so, the owners proceeded to do the work themselves at once without waiting to be served by the sanitary authority with a notice under s. 4 of the said Act requiring them to do the work. The expense incurred by them in doing the work amounted to 70*l.* 1*s.* 6*d.* In an action by the owners to recover that sum from the defendant under his covenant to pay all outgoings:—

Held, that the action could not be maintained upon the grounds—

1. That the owners, having done the work immediately upon receipt of the intimation of the existence of the nuisance and before service of any

(1) 6 R. 167.

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notice requiring them to abate it, did it voluntarily and not under any obligation, and that the expenditure was consequently not an "outgoing" within the meaning of the covenant; and

2. That, even if a covenant to pay outgoings would cover such an expenditure, it was not, having regard to the proportion which the expenditure bore to the yearly rent, a covenant which was applicable to a yearly tenancy, and that the defendant in holding over after the expiry of his term and paying rent could not be presumed to have intended to become a yearly tenant on the terms of such an obligation.

Valpy v. *St. Leonards Wharf Co.*, (1903) 1 L. G. R. 305, followed.

ACTION tried before Wright J. without a jury.

By an agreement of tenancy dated May 22, 1896, C. W. Sawbridge let to the defendant a house known as Winchester House, situate at Alleyne Park, Dulwich, for the term of three years from March 25, 1896, at a yearly rental of 70*l*. By the said agreement the defendant agreed to pay "all present and future rates, taxes, assessments, and outgoings whatsoever in respect of the said premises, whether payable by the landlord or tenant (except landlord's property tax)." The agreement having expired on March 25, 1899, the defendant continued in occupation without any new agreement, and paid rent at the former rate. In the year 1899 the plaintiffs purchased the lessor's reversion, and the defendant thenceforward paid rent to them. On January 20, 1903, a notice, headed "Intimation.—Public Health (London) Act, 1891," was served upon the plaintiffs, requiring them to take notice that the borough council of Camberwell, being the sanitary authority in whose district the premises were situate, had received information that the premises were in such a state as to be a nuisance owing to the drain being defective and obstructed, the ground-floor water-closet being defective, and there being a want of a proper cover to the sweeping eye of the interceptor in the forecourt. The notice went on to require the plaintiffs to forthwith open up the drains for inspection by the sanitary officer, and to do such other work as might be necessary to effectually abate the nuisance and prevent its recurrence, and concluded that, after the expiration of seven days from the service of this intimation, the borough council would cause proceedings to be commenced and the nuisance to be dealt with in a summary manner before

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a magistrate. The notice was signed by E. R. Collins, the sanitary inspector of the district. On receipt of the notice the plaintiffs wrote to the defendant and requested him to do the necessary work to abate the nuisance, and upon his refusing to do so they proceeded to do the work themselves forthwith. It was found that total reconstruction of the drain was necessary, and that the water-closets also required refitting. This work was done at a cost of 70*l.* 1*s.* 6*d.* under the supervision of the sanitary inspector and to his satisfaction, and no work was done other than that which he required and was necessary for proper sanitation. No notice in respect of the above-mentioned nuisance was served upon the plaintiffs by or on behalf of the sanitary authority other than the above-mentioned notice headed "Intimation." The plaintiffs brought this action to recover the expenditure incurred by them in doing the work from the defendant under his agreement to pay outgoings.

Shearman, K.C., and *Ernest Pollock*, for the plaintiffs.

Heber Hart, for the defendant. As the nuisance arose from a defect of a structural character the liability to abate it rested primâ facie upon the plaintiffs, and there is nothing in the defendant's agreement to transfer that liability to him. The expenditure by the landlords upon the drains was not an outgoing within the meaning of the covenant, for it was a purely voluntary act. There was no compulsion by the sanitary authority. The only notice served on the plaintiffs was an "intimation" under s. 3 of the Public Health (London) Act, 1891. (1) This is clear from the fact that

(1) By the Public Health (London) Act, 1891, s. 2, sub-s. 1, "For the purposes of this Act—(*b*) Any .... water-closet .... drain, &c. .... in such a state as to be a nuisance or injurious or dangerous to health .... shall be nuisances liable to be dealt with summarily under this Act."

Sect. 3: "Information of a nuisance liable to be dealt with summarily under this Act in the district of a sanitary authority may be given to that authority by any person, ... and it shall be the duty .... of the sanitary authority to give such directions to their officers as will secure the existence of the nuisance being immediately brought to the notice of any person who may be required to abate it, and the officer shall do so by serving a written intimation."

Sect. 4, sub-s. 1: "On the receipt of any information respecting the existence of a nuisance liable to be

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it was signed by the sanitary inspector, who has no authority to issue an abatement notice under s. 4. Non-compliance with the intimation under s. 3 entails no penal consequences. It may be that non-compliance with the terms of the intimation would have been followed by a notice under s. 4; but the plaintiffs should have waited till that notice was issued. As they acted too soon they must bear the cost. Secondly, even if the expenditure under the circumstances could be regarded as compulsory and therefore as an outgoing, there was no agreement by the defendant to pay outgoings. No doubt a tenant under a lease who holds over after the expiry of his term and pays rent, presumably intends to become a tenant from year to year upon the terms of such of the covenants of the lease as are applicable to a yearly tenancy. But a covenant to pay the cost of permanent structural repairs such as the reconstruction of a drain is not one which is applicable to a yearly tenancy: *Valpy* v. *St. Leonards Wharf Co.* (1)

Ernest Pollock, in reply. Practically the plaintiffs in executing the work were acting under compulsion of law. The existence of the nuisance and the necessity of its abatement by somebody were not in dispute. And it cannot be that where the state of things is such that, unless the person served with the intimation begins to do the work at once, an imperative notice under s. 4 will of necessity follow in due course, the person so served must, if he wishes to throw the expense of the work on

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dealt with summarily under this Act the sanitary authority shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act, default, or sufferance the nuisance arises or continues, or, if such person cannot be found, on the occupier or owner of the premises on which the nuisance arises, requiring him to abate the same within the time specified in the notice, and to execute such works and do such things as may be necessary for that purpose."

Sub-s. 3: "Provided that—(*a*) where the nuisance arises from any want or defect of a structural character .... the notice shall be served on the owner."

Sub-s. 4: "Where a notice has been served on a person under this section and .... (*b*) such person makes default in complying with any of the requisitions of the notice within the time specified, he shall be liable to a fine not exceeding ten pounds."

(1) 1 L. G. R. 305.

the person ultimately responsible, wait until the second notice has been served on him, although by so delaying the abatement of the nuisance he may be causing serious danger to health and possibly to life. The object of notice under s. 4 is, as was pointed out by Lord Russell C.J. in *Andrew* v. *St. Olave's Board of Works* (1), to put "upon the person served, not for all time, but primâ facie and for the time being, the liability to do what it is necessary should promptly be done, leaving the question of his ultimate liability to be dealt with subsequently." And what is true in this respect of a notice under s. 4 is equally true of a notice under s. 3. Moreover, the intimation served on the plaintiffs contained a threat that non-compliance with the requirements would be followed by summary proceedings before a magistrate. Then, if this was an outgoing, the defendant agreed to pay it. An agreement to pay an expense of this description is not inapplicable to a yearly tenancy. The case of *Valpy* v. *St. Leonards Wharf Co.* (2) was wrongly decided, and should not be followed. It was distinguished in *Stockdale* v. *Ascherberg* (3) in a manner which amounted to dissent.

WRIGHT J. I am of opinion that upon both grounds this action fails. It appears that the only notice with respect to this nuisance that was issued to the plaintiffs was a mere intimation of the existence of the nuisance under s. 3 of the Act of 1891. That notice could not operate as a notice under s. 4, for it was only signed by the inspector, and did not purport to be issued by the sanitary authority at all. This distinguishes the present case from *Andrew* v. *St. Olave's Board of Works*. (4) There a notice was served under s. 4, and non-compliance with the requirements of that notice primâ facie rendered the plaintiff liable to a penalty. He was consequently practically compelled to do the work. Here there was no compulsion at all. It is not enough to shew that the plaintiffs did the work; it must be shewn that they did it under an

(1) [1898] 1 Q. B. 775, at p. 781.
(2) 1 L. G. R. 305.
(3) [1903] 1 K. B. 873.
(4) [1898] 1 Q. B. 775.

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Wright J.

order of the sanitary authority. Such an order is contained in a notice under s. 4; but nothing less than a notice under that section will suffice. The work having been done by the plaintiffs voluntarily, the expense of doing it did not amount to an outgoing within the meaning of the covenant in the lease. But assuming that I am wrong upon that point, and that it did under the circumstances of the case amount to an outgoing, so that if the lease had been still subsisting the defendant would have been liable under his covenant to recoup the plaintiffs, there arises the serious question whether, the lease having expired and the tenant having held over and paid rent, the covenant by the tenant in the lease to pay "all present and future rates, taxes, assessments, and outgoings whatsoever in respect of the said premises, whether payable by the landlord or tenant," is one which is to be taken to be attracted into the tenancy from year to year, which presumably arises from the fact of the tenant so remaining in occupation. It is not disputed that the question what are the terms upon which a tenant holds over after the expiration of his tenancy is one of fact; but at the same time there is a presumption that he does so upon such of the terms of the lease as are applicable to a yearly tenancy. Then is a covenant to pay outgoings of this description applicable to a yearly tenancy? In the case of *Valpy* v. *St. Leonards Wharf Co.* (1), where there was a lease of a cottage from year to year at a rent of 20*l.*, Farwell J. held that a covenant by the tenant to pay outgoings did not include the expense of paving a yard in obedience to a notice from the local authority at a cost of 58*l.* He thought he ought not to impute to the parties an intention to include such an expenditure in the terms of a tenancy from year to year. In *Stockdale* v. *Ascherberg* (2), where a tenant for a term of three years agreed to pay all outgoings, I had to consider whether the principle of *Valpy's Case* (1) applied. I held that it did not. But the present case seems to be directly covered by Farwell J.'s decision. I think I ought not to presume that a tenant from year to year intended to make himself liable for an

(1) 1 L. G. R. 305.

(2) [1903] 1 K. B. 873.

expenditure on repairs amounting to a sum exceeding his rent. There must be judgment for the defendant.

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Judgment for the defendant.

Solicitors for plaintiffs: *Taylor & Taylor.*
Solicitors for defendant: *Hutchison & Cuff.*

J. F. C.

CORPORATION OF WESTMINSTER *v.* JOHNSON. THE SAME *v.* FULLER.

1903
Nov. 10.

Land Tax—Public Underground Lavatories—Public Health (London) Act, 1891 (54 *&* 55 *Vict. c.* 76), *ss.* 44, 45—*Land Tax Act,* 1797 (38 *Geo.* 3, *c.* 5), *s.* 4.

A sanitary authority who under the powers conferred by the Public Health (London) Act, 1891, provide and maintain public lavatories under the public streets have not such rights of ownership in the lavatories as to render them liable to be charged with land tax in respect of them.

TRIAL OF ACTIONS before Wright J. without a jury.

The plaintiffs' claim in Johnson's case was against the defendant as collector of land tax for the Regent Ward No. 1 of the parish of St. James, Westminster, for a declaration that the property known as the underground convenience, and situate at Piccadilly Circus in the city of Westminster, is exempt from land tax; and in Fuller's case the claim was against the defendant as collector of land tax for the Great Marlborough Ward of the said parish for a similar declaration in respect of two underground conveniences situate at Broad Street, W., and Great Marlborough Street, W., respectively. The two actions were tried together.

The facts, which were agreed upon between the parties, were as follows:—

The council of the city of Westminster, pursuant to and in execution of and in accordance with the provisions of the Public Health (London) Act, 1891, ss. 44 and 45, maintain in the city a number of public lavatories and public sanitary conveniences for the use and benefit of the public. The said lavatories

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and conveniences (with one exception) are (though this is not admitted by the defendants to be material) each a source of expense to the council, and a burden upon the city rates, and, taking the whole of them together, they are collectively a source of expense to the city and a burden upon the city rates. The said lavatories and conveniences are all managed together as one enterprise and by one department of the city administration. Among the said lavatories and conveniences are the three which form the subjects of the present actions.

Under the Metropolitan Street Improvements Act, 1877, a block of houses lying between Piccadilly Circus and Tichborne Street was, for the purpose of improving and widening Piccadilly, pulled down, and the site of those houses was thrown into the street. Upon the completion of the improvements the streets and paved portions of land which formed Piccadilly Circus, and also the streets in and about the Circus affected by or made under the Act, were handed over to the vestry of St. James, Westminster. The whole of the said streets were, partly under the Act and partly prior thereto, dedicated to the public use.

During the years 1890-1 the said vestry, in pursuance of statutory powers conferred by the Metropolis Local Management Act, 1855, constructed a public convenience in Piccadilly Circus, which convenience was under their powers conferred by the said Act and by the Public Health (London) Act, 1891, considerably enlarged and altered by them in the year 1894. This is the convenience which forms the subject of the action in Johnson's case. It is constructed partly upon the site of certain of the houses which were pulled down and partly upon a portion of the old street. It consists substantially of an underground opening with brick walls eighteen inches thick, faced with enamel tiles and a floor of mosaic upon concrete, completely protected from the weather by a roof with pavement lights, forming the floor of an island in the roadway substantially of the same area as the convenience. The convenience is lighted by electricity and gas. Its construction as enlarged cost about 5090*l*. It contains twenty water-closets, twenty-one urinals, and fourteen lavatories. It is constructed wholly

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underground, mainly under the island, but partly under the carriage-way. It is entered by means of two separate staircases, each opening on to the pavement of the island.

The two conveniences which form the subject of the action in Fuller's case, situate in Great Marlborough Street and Broad Street respectively, were constructed by the vestry of St. James, Westminster, under the Public Health (London) Act, 1891. They are similar in construction to the convenience at Piccadilly Circus. The Great Marlborough Street convenience, which contains six water-closets, six urinals, and four lavatories, cost 1700*l.* The Broad Street convenience, which contains nine water-closets, nine urinals, and four lavatories, cost 2050*l.* Both conveniences are constructed wholly underground, partly under the carriage-way of the street and partly under an island therein. They are constructed in "made ground" forming part of either the street or the foundation of the street. In the case also of the Piccadilly Circus convenience the space occupied by it is "made ground" consisting of brick and other rubbish placed there in the course of carrying out the improvements authorized by the Act of 1877 and making the streets and island now there, the levels of the land having been considerably altered by the Board's improvement.

The city council place two men and two women in charge of each of the said three conveniences at Piccadilly Circus, Marlborough Street, and Broad Street respectively, for the purpose of keeping order and keeping the place clean and taking charge of the lavatories, urinals, and closets. A charge of 1*d.* is made for the use of the closets, and 2*d.* for the use of the lavatories, including in the latter case water, soap, towel, and brushes. The charge is made under s. 45 of the Public Health (London) Act, 1891, for the purpose of aiding in meeting the expenditure on public conveniences and lavatories in the city (and is so applied) and with the object of placing some check on a too indiscriminate public user. The charges are not made with a view to profit. The convenience at Piccadilly Circus is open from 7 A.M. to 1 A.M.; that at Great Marlborough Street is open from 7.30 A.M. to 11.30 P.M.; and that at Broad Street is open from 7.30 A.M. to midnight for men, and

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till 11.30 P.M. for women. The convenience at Piccadilly Circus produces an income in excess of the expenses, but it is the only one that does.

The land tax in respect of one of the houses on the site of which the Piccadilly Circus convenience was constructed had been redeemed prior to the passing of the Metropolitan Street Improvements Act, 1877. The land in respect of the other houses on the said site had not been redeemed. From the date when the Metropolitan Board of Works took possession of the houses under the said Act no land tax whatever has been paid. The said Board paid the Crown the value of the freehold, which was Crown property, but no conveyance has been made by the Crown either to the said Board or their successors, the county council, or to any one else.

In the case of both the Great Marlborough Street convenience and that at Broad Street, the land tax in respect of some of the houses opposite to those conveniences has been redeemed, but in respect of others of the houses opposite thereto it has not, and the latter houses are and always have been assessed to land tax. At the date of the said redemption of land tax the sites of the streets surrounding the said last-mentioned conveniences were streets substantially as at present.

The Piccadilly Circus convenience was assessed in the valuation list made in pursuance of the Valuation (Metropolis) Act, 1869, and in force at the time of the assessment hereinafter mentioned, at 250*l.* gross, but neither of the other two conveniences have ever been entered or assessed in any such list.

In December, 1900, the corporation of Westminster was assessed to the land tax for the year ending March 25, 1901, in respect of the Piccadilly Circus convenience in the sum of 250*l.*, and in the sum of 80*l.* each in respect of the other two conveniences. No previous assessment to such tax had ever been made in respect of any of the said conveniences. The question which the parties agreed in each action to be the question to be decided between them was whether land tax could be assessed in respect of the said conveniences.

Danckwerts, K.C., and *Mayer*, for the plaintiffs in both actions. The plaintiffs do not "have and hold" these conveniences as "hereditaments" within the meaning of s. 4 of the Land Tax Act, 1797. (1) It is true that s. 44, sub-s. 2, of the Public Health (London) Act, 1891 (2), provides that for the purpose of the maintenance of these conveniences the "subsoil of any road . . . . shall be vested in the sanitary authority"; but the effect of that provision is not to give the plaintiffs a fee simple in the soil. That expression as applied to public authorities has on several occasions received judicial interpretation. Thus in *Rolls* v. *Vestry of St. George, Southwark* (3), James L.J., speaking of the provision in s. 96 of the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), that the streets being highways shall "vest" in the vestry, says that "according to its true construction what is to vest is not those pieces of property which have now got the name and are distinguished by the name of streets, but those

(1) By the Land Tax Act, 1797, s. 4, it is enacted that "All and every manors, messuages, lands, and tenements . . . . and all hereditaments of what nature or kind soever they be . . . . and all and every person and persons, bodies politic and corporate, guilds, mysteries, fraternities, and brotherhoods, whether corporate or not corporate, having or holding any such manors, messuages, lands, tenements or hereditaments or other the premises in respect thereof shall be charged" to the land tax.

(2) By the Public Health (London) Act, 1891, s. 44, sub-s. 1, "Every sanitary authority may provide and maintain public lavatories and ashpits and public sanitary conveniences other than privies, in situations where they deem the same to be required, and may supply such lavatories and sanitary conveniences with water, and may defray the expense of providing such lavatories, ashpits, and sanitary conveniences, and of any damage occasioned to any person by the erection or construction thereof, and the expense of keeping the same in good order, as if they were expenses of sewerage."

Sub-s. 2: "For the purpose of such provision the subsoil of any road, exclusive of the footway adjoining any building or the curtilage of a building, shall be vested in the sanitary authority."

Sect. 45, sub-s. 1: "Where a sanitary authority provide and maintain any public lavatories, ashpits, or sanitary conveniences, such authority may—

"(*b*) Let the same for any term not exceeding three years at such rent and subject to such conditions as they may think fit.

"(*c*) Charge such fees for the use of any lavatories or water-closets provided by them as they may think proper."

(3) (1880) 14 Ch. D. 785, at p. 796.

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things which now or at any time hereafter shall for the time being be streets and highways within the district. It appears to me that the legitimate construction of the enactment that streets being highways shall vest is that streets if and so long as they are highways shall be vested. There are no words of inheritance, there are no words of perpetuity in the Act, there is nothing to say whether the streets are to vest in fee simple or for any limited estate, and it appears to me that they are given to and vested in the public body for the purposes of the Act and during the time for which those purposes require them to be held and no longer. Words of divesting or defeasance are not required, because to my mind the interest of the vestry is exactly like a limited estate . . . . It appears to me that when the thing has ceased to be a highway, when it has ceased to be a street, then it ceases to be vested, because the period for which it was to be vested in the board has come to an end." The same view was adopted by the House of Lords with reference to the corresponding provision in s. 149 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), in *Tunbridge Wells Corporation* v. *Baird* (1) Lord Herschell there says: "It seems to me that the vesting of the street vests in the urban authority such property and such property only as is necessary for the control, protection, and maintenance of the street as a highway for public use." Similarly, in *Bradford* v. *Eastbourne Corporation* (2), Lord Russell C.J., dealing with the meaning of s. 13 of the Public Health Act, 1875, which provides that sewers shall vest in the local authority, says (3): "It has been clearly held that the vesting is not a giving of the property in the sewer and in the soil surrounding it to the local authority, but giving such ownership and such rights only as are necessary for the purpose of carrying out the duties of a local authority with regard to the subject-matter."

[They also referred to *Finchley Electric Light Co.* v. *Finchley Urban Council.* (4)]

(1) [1896] A. C. 434, at p. 442.
(2) [1896] 2 Q. B. 205.
(3) [1896] 2 Q. B. at p. 211.
(4) [1903] 1 Ch. 437. A further point was raised by the plaintiffs as to whether the conveniences being

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Macmorran, K.C., and *Rowlatt*, for the defendants in both actions. The corporation are the owners of these conveniences, and as such are liable to land tax in respect of them. They can charge for the use of them. They have the exclusive possession of them. They can lock them up and exclude the public from them at such hours as they think proper. They could maintain an action of trespass in respect of them. It may be that they have only got a limited interest in them, and that that interest will enure only so long as they use the locus in quo for the purposes of the Act, in the same manner as they have only a limited interest in the soil of the streets; but that fact will not prevent the interest from amounting to ownership while it lasts. The only reason why streets are not assessed to land tax is because they are of no value at all—they are incapable of producing a profit. But with these conveniences it is otherwise. Though they may in fact be maintained at a loss, they are capable of producing a profit if the corporation were minded to make it. Indeed, s. 45, sub-s. 1 (*b*), of the Act of 1891 expressly authorizes the corporation to let them "at such rent and subject to such conditions as they may think fit." In the face of that provision it cannot well be contended that they have not got ordinary rights of ownership. They are just as much the owners of a hereditament as were the railway company in *Metropolitan Ry. Co.* v. *Fowler* (1) in respect of the tunnel which they had constructed under a highway for the purposes of their railway. There the company were not required by their Act to wholly take the land under the highway, but only authorized to appropriate and use it. And it was held that they were chargeable with land tax.

Danckwerts, K.C., in reply. In *Metropolitan Ry. Co.* v. *Fowler* (1) the appellants were not a public body, but private

partly situate upon land in respect of which the land tax was redeemed, and the assessment to land tax in each case being in respect of the whole convenience, the assessment was not bad. But the judge declined to entertain the question, as it was not one which the parties had agreed to be a question to be decided between them in the action.

(1) [1893] A. C. 416.

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undertakers who constructed the tunnel for their own profit as part of their railway system. Here the corporation are nothing more than controllers and administrators of the subject-matter. In *Hinde* v. *Chorlton* (1) Willes J., in the course of his judgment, observed: "There is a whole series of authorities in which words, which in terms vested the freehold in persons appointed to perform some public duties, such as canal companies and boards of health, have been held satisfied by giving to such persons the control over the soil which was necessary to the carrying out the objects of the Act without giving them the freehold."

WRIGHT J. The Land Tax Act, 1797, provides, so far as is material for the present purposes, that all persons "having or holding any . . . . lands, tenements, or hereditaments" shall be charged to the land tax, and the question is whether the corporation of Westminster "have or hold" these conveniences as "hereditaments" within the meaning of that enactment. It seems to me to be tolerably plain that the Act, when speaking of persons "having or holding . . . . tenements or hereditaments," is primâ facie using that language with reference to ordinary unqualified rights of property, and the question is whether a restricted and qualified property such as the sanitary authority have in places of this description can properly be brought within the operation of the Act. The nature and extent of the right which they have is, I think, best described in the language of Lord Herschell in *Tunbridge Wells Corporation* v. *Baird* (2), where, dealing with the question of the extent to which the soil of a street vests in an urban authority under the Public Health Act, 1875, he says (3): "It seems to me that the vesting of the street vests in the urban authority such property and such property only as is necessary for the control, protection, and maintenance of the street as a highway for public use." And in *Bradford* v. *Eastbourne Corporation* (4) Lord Russell C.J. uses similar

(1) (1866) L. R. 2 C. P. 104, at p. 116.
(2) [1896] A. C. 434.
(3) [1896] A. C. at p. 442.
(4) [1896] 2 Q. B. 205, at p. 211.

language with reference to the Act of 1875: "It has been clearly held that the vesting is not a giving of the property in the sewer and in the soil surrounding it to the local authority, but giving such ownership and such rights only as are necessary for the purpose of carrying out the duties of a local authority with regard to the subject-matter." Here, of course, the vesting of the soil of the street in the sanitary authority under the Public Health (London) Act, 1891, is a little different from that under the Public Health Act, 1875, because it is a vesting for the purpose of providing and maintaining these conveniences, but the principle is the same.

It seems to me that when the corporation as the sanitary authority appropriate a piece of land under one of their streets for a purpose of this kind they do not acquire anything equivalent to a general property: they acquire only such an interest as is necessary for the purpose of discharging their public duty. And I think it makes no difference in this respect that they have built upon the land so appropriated by them a structure of a substantial and permanent character. They are authorized to build it for the purpose of and in discharge of their sanitary duties only, and that limitation of authority precludes them from being regarded as owners of the structure in the ordinary sense of the term. In the case of *Metropolitan Ry. Co.* v. *Fowler* (1) the facts were very different. There the railway company had made a permanent appropriation of the soil, not in the discharge of any public duties, but for the purposes of their own private undertaking, and there is nothing in the language of the Lords who gave judgment in that case to warrant me in supposing that they would have taken the same view as to liability to land tax with respect to the very limited ownership which the sanitary authority have in such a case as the present. Further, it is to be observed that the whole of these conveniences are constructed in made ground—that is to say, in soil which is put there by the local authority in the exercise of its powers and duties of making up the level of the street; and it seems to me reasonable to consider that whatever is inclosed in the soil which is placed there merely

(1) [1893] A. C. 416.

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for the purposes of the street is entitled to the same exemption as the soil in which it is inclosed, and there seems to be no precedent for assessing the soil of the street itself to the land tax. I must, therefore, hold that the plaintiffs are not liable to be assessed to the land tax in respect of any of these conveniences.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Caprons, Hitchins, Brabant & Hitchins.*

Solicitors for defendants: *Miller, Vardon & Miller.*

J. F. C.

C. A. 1903 *Oct.* 27.

[IN THE COURT OF APPEAL.]

BROWN *v.* DIMBLEBY.

Husband and Wife—Married Women's Property Acts—Contract by Married Woman during Coverture—Judgment after cessation of Coverture—Separate Property—Restraint upon Anticipation—Married Women's Property Act, 1893 (56 & 57 *Vict. c.* 63), *s.* 1.

Where a married woman, who was entitled to the income of trust funds for life, for her separate use, without power of anticipation, signed promissory notes in 1897, and, her husband having subsequently died, judgment was, after his death, recovered against her in an action on the notes:—

Held, on the authority of *Barnett* v. *Howard*, [1900] 2 Q. B. 784, that a receiver could not be appointed to receive the before-mentioned income by way of equitable execution on the judgment.

APPEAL from an order of Walton J. at chambers refusing an application by the plaintiff for the appointment of a receiver as after mentioned.

The plaintiff had recovered judgment against the defendant, a widow, in an action against her upon certain promissory notes. The defendant, who was married in 1892, signed the notes, as joint maker of them with her husband, in 1897. The defendant's husband died in 1902, and, the notes not having been paid, the action was brought by the plaintiff, as executrix of the payee, after the death of the defendant's husband, and

judgment was obtained against the defendant under Order XIV. in the ordinary form. By the will of the defendant's father, proved in 1882, she became entitled to the income of certain trust funds, which were by the will settled for her separate use for life, without power of anticipation during coverture. The plaintiff applied to Walton J. at chambers for the appointment of a receiver of this income by way of equitable execution on the judgment. No instalments of this income were then due to the defendant. The learned judge upon the authority of *Barnett* v. *Howard* (1) refused the application, but gave leave to appeal.

Archibald Brown, for the plaintiff. It must be admitted that, if the construction put by the Court of Appeal upon the proviso to s. 1 of the Married Women's Property Act, 1893, in *Barnett* v. *Howard* (1) is followed, the decision in that case covers this appeal. That case, however, was decided by two judges only, one of whom expressed considerable doubt as to the effect of the proviso. It is submitted that the authorities on the subject in the Court of Appeal are not altogether consistent or satisfactory, and that, under the circumstances, the Court should, in its discretion, refer the case for argument to the full Court of Appeal with a view to a reconsideration of the subject. It is contended, with submission, that the view expressed by Kay L.J. on this point in *Pelton* v. *Harrison* (2), and the decision in *Softlaw* v. *Welch* (3), were based upon a misconception as to the nature of the restraint upon anticipation, and in supposing that the decision in *Pike* v. *Fitzgibbon* (4) applied to cases under the Married Women's Property Acts. In *Holtby* v. *Hodgson* (5) Lindley L.J., in giving judgment, said: "Now it has been argued before us that the judgment obtained by the plaintiff is not such a judgment as can be made the foundation of garnishee proceedings; it is said that it does not bind the defendant personally, but only binds her separate estate. This is really very much a question

(1) [1900] 2 Q. B. 784.
(2) [1891] 2 Q. B. 422.
(3) [1899] 2 Q. B. 419.
(4) (1881) 17 Ch. D. 454.
(5) (1889) 24 Q. B. D. 103.

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of language. The judgment is that the plaintiff do recover a sum of money against the defendant, but that execution is to be limited to her separate estate not subject to a restraint upon anticipation. Suppose her husband were to die, the restraint would be gone, the judgment would bind her, and execution could be issued upon it. In fact, the judgment is obtained against the married woman, but it is not executed in the ordinary way; execution issues upon it against the only portion of her property which can be got at, her separate property not specially protected, for the restraint on anticipation operates as long as her husband is alive. It is not true therefore to say that the judgment is not a judgment against her." These observations shew that, upon the cessation of the coverture, the restraint on anticipation falling off, there is no reason why the judgment should not be enforced against the property then belonging to the widow without any restraint on anticipation in any way in which a judgment can be enforced against a single woman. The judgment in *Softlaw* v. *Welch* (1) was based on that in *Pelton* v. *Harrison* (2); but in that case the judgment against the widow was drawn up in the form settled in *Scott* v. *Morley* (3), and in truth the only question was as to the effect of a judgment in that form after the cessation of the coverture. It was not really necessary to decide whether, if the judgment had not been in that form, the property in that case could have been made available by way of equitable execution; and any expression of opinion on that question was merely obiter. See also on this subject *In re Wheeler's Settlement Trusts*. (4) The true view of the effect of the legislation as to married women's property, at any rate since the Act of 1893, is that a married woman is capable of contracting, but, if an action upon the contract is brought against her, and judgment recovered during the coverture, then the execution must be limited as in *Scott* v. *Morley* (3), so as to exclude separate property as to which there is a restraint on anticipation during coverture. But, if the judgment is recovered against her after she has become a widow, the property to

(1) [1899] 2 Q. B. 419.
(2) [1891] 2 Q. B. 422.
(3) (1887) 20 Q. B. D. 120.
(4) [1899] 2 Ch. 717, at p. 723.

which she is then entitled without any restraint on anticipation becomes available for the purpose of execution as in the case of a spinster. It is submitted that that is now the law on the subject upon the plain grammatical construction of the Married Women's Property Act, 1893, whatever may have been the case prior to that Act. The Court held in *Barnett* v. *Howard* (1) that the words "which at that time or thereafter she is restrained from anticipating" in the proviso to s. 1 of the Act of 1893 refer to the time of entering into the contract. Such a construction is grammatically inadmissible, as it involves reading "was restrained" for "is restrained." [He also cited *Palliser* v. *Gurney* (2); *Harrison* v. *Harrison* (3); *Cox* v. *Bennett.* (4)]

Hume-Williams, *K.C.*, and *T. T. Blyth*, for the defendant, were not called upon to argue.

COLLINS M.R. I am of opinion that this application must fail. The application before us really is to have the question raised by this appeal argued before the full Court of Appeal. The question raised is whether, in a case where a married woman became the joint maker of certain promissory notes with her husband during his lifetime, separate property belonging to her, as to which she was restrained from anticipation during coverture, can be made available to satisfy a judgment signed in an action against her upon the notes after her husband's death. The learned judge has held that it cannot, and has therefore refused to appoint a receiver of that property. An appeal having been brought against his decision, it is now asked that the appeal should be heard before the full Court of Appeal. It seems to me that no sufficient ground is made out for that application. It is admitted for the plaintiff that the decision in the case of *Barnett* v. *Howard* (1) is directly in point, and is adverse to the plaintiff's contention. The only arguments urged in support of the application were that that decision was by a Court consisting of two judges only, and that it was inconsistent with other decisions in this Court.

(1) [1900] 2 Q. B. 784.
(2) (1887) 19 Q. B. D. 519.
(3) (1888) 13 P. D. 180.
(4) [1891] 1 Ch. 617.

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But, when I look at the case, it appears to me that, so far as concerns the question raised in this case, it simply follows a series of other decisions in the Court of Appeal. In *Barnett* v. *Howard* (1) a married woman, who was possessed of separate property, the income of which she was restrained from anticipating, entered into a contract, and was subsequently divorced. Judgment was then obtained against her in an action on the contract. Upon proceedings to enforce that judgment it became necessary to consider the effect of s. 1 of the Married Women's Property Act, 1893. The result of the decision was that, though that section in certain respects enlarged the species of property to which the creditor of the married woman could have recourse for the purpose of satisfying his judgment, the effect of the proviso therein contained was to safeguard the immunity previously attaching to the separate property of a married woman as to which she was restrained from anticipation, and to leave the law with reference to this question the same as it was before the Act. It was held in the case of *Softlaw* v. *Welch* (2) that, where judgment was recovered in an action against a widow upon a contract entered into by her during coverture after the passing of the Married Women's Property Act, 1882, and before the passing of the Married Women's Property Act, 1893, the plaintiff was not entitled to a judgment in the ordinary form as though the defendant were a feme sole, and could only sign judgment in the form settled by the Court of Appeal in *Scott* v. *Morley* (3) in an action against a married woman with such verbal alterations as were necessary to adapt that form to a judgment against a widow. That case is important as shewing that, as regards the present question, the effect of the construction put upon the proviso to s. 1 of the Married Women's Property Act, 1893, in *Barnett* v. *Howard* (1) is that the law on this subject remains the same under that Act as it was under the previous Act of 1882. The decision in *Softlaw* v. *Welch* (2) followed that in *Pelton* v. *Harrison*. (4) The suggestion that there was really no decision with regard to the

(1) [1900] 2 Q. B. 784.
(2) [1899] 2 Q. B. 419.
(3) 20 Q. B. D. 120.
(4) [1891] 2 Q. B. 422.

law on the subject, apart from the form of the judgment, in that case, is sufficiently answered by a reference to what was said by Vaughan Williams L.J. in giving judgment in *Softlaw* v. *Welch*. (1) He there said: "It may be urged that the judgment in *Pelton* v. *Harrison* (2) may be supported as being based on the *Scott* v. *Morley* (3) form of the judgment which in that case was sought to be enforced against the widow; but I think it is clear from the latter part of the judgment that Kay L.J. meant to decide the case on principle and not on the form of the judgment. He seems to me to put it quite plainly that the Married Women's Property Act, 1882, did not intend to enable a married woman by a contract entered into by her during coverture to incur any liability except in respect of and to the extent of her separate property held by her during coverture without restraint on anticipation, or, as it has been called, her free separate property, and that the Act did not intend to make liable on such a contract during coverture, or a judgment obtained in an action brought to recover a debt arising on such a contract, property acquired by her after the death of her husband, nor any property, though separate property, as to which during coverture she was restrained from anticipation." The case of *Pelton* v. *Harrison* (2) was decided in the Court of Appeal by Kay L.J. and Lopes L.J. The facts were these. A married woman, who had separate property subject to a restraint on anticipation, incurred a pecuniary liability. After the death of her husband she was sued, and judgment was recovered against her limited to her separate property not subject to any restriction against anticipation. The execution creditor having obtained an order for a receiver of the income of such property, it was held that the removal, by reason of the death of the husband, of the restraint on anticipation did not make the property liable, and that the order must be discharged. In all these cases the question was involved whether separate property, as to which a married woman was restrained from anticipation at the date of a contract made by her, could be rendered available to satisfy

(1) [1899] 2 Q. B. 419. (2) [1891] 2 Q. B. 422.
(3) 20 Q. B. D. 120.

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a judgment obtained against her in an action upon the contract after the cessation of the coverture; and in all of them the decision of the Court of Appeal was to the same effect—namely, that it could not. These decisions appear to me entirely in consonance with the provisions of the legislation on the subject, and I cannot see that there is any such discrepancy between the authorities as suggested by the plaintiff's counsel. For these reasons I think that there is no ground for referring this case to the full Court, and that the appeal must be dismissed.

MATHEW L.J. I am of the same opinion. The construction put by the Court of Appeal in the case of *Barnett* v. *Howard* (1) upon the proviso to s. 1 of the Married Women's Property Act, 1893, appears entirely to cover the present case. I think that all the efforts of the plaintiff's counsel have failed to shew that the decisions on this question, to which reference has been made, were given under any misapprehension. It appears to me clear upon the true construction of the proviso to s. 1 of the Married Women's Property Act, 1893, that the Legislature intended that a contract entered into by a married woman should not bind property as to which she was restrained from anticipation, and that such property should stand entirely clear of any liabilities or engagements contracted by her during coverture.

COZENS-HARDY L.J. I am of the same opinion. I think this application must fail unless the plaintiff can shew some conflict of authority on this subject in the Court of Appeal. I can see no such conflict.

The decisions on this question in the cases to which we have been referred appear to me to be all uniform.

Appeal dismissed.

Solicitors for plaintiff: *Dunn & Hilliard.*

Solicitors for defendant: *Blyth, Dutton, Hartley & Blyth.*

(1) [1900] 2 Q. B. 784.

E. L.

[IN THE COURT OF APPEAL.]

C. A. 1903 *Nov.* 16.

BIRMINGHAM EXCELSIOR MONEY SOCIETY *v.* LANE.

Husband and Wife—Married Woman—Ante-nuptial Debt, Judgment for—Execution—Separate Property—Restraint on Anticipation—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 19.

A judgment against a married woman in respect of a debt contracted by her before marriage cannot be enforced by way of equitable execution against her separate property subject to a restriction against anticipation, where the restriction is not contained in a settlement, or agreement for a settlement, of her own property, made or entered into by herself.

APPEAL against the refusal of Ridley J. to order the form in which a judgment had been signed to be amended, and against an order of the same learned judge appointing a receiver as after mentioned.

The action was against the defendant, a married woman, upon a promissory note made by her before marriage. The defendant was married in July, 1902. Leave to sign judgment against her in the action was obtained under Order XIV., and judgment was signed against her on December 31, 1902, for the sum due on the note and costs, "to be payable out of her separate property, whether subject to any restriction against anticipation or not, and not otherwise." It appeared that in March, 1903, a separation deed was entered into between the defendant and her husband, in which he covenanted during their joint lives, if they should so long live separate from each other, to pay the annual sum of 78*l.*, for the defendant's separate use, without power of anticipation, by equal monthly payments. The plaintiffs applied at chambers for the appointment of a receiver of the sum so covenanted to be paid by way of equitable execution on the judgment, and the defendant applied for an amendment of the judgment by striking out the words "whether subject to any restriction against anticipation or not." The learned judge made an order for the appoint-

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ment of a receiver, and refused the application to amend the judgment.

J. S. Pritchett, for the defendant. The case of *Axford* v. *Reid* (1) was cited to the learned judge at chambers as an authority in this case; but that case, when looked at, will be found not to be in point. It was decided under the Married Women's Property Act, 1870. That Act was repealed by the Married Women's Property Act, 1882, and the present case depends upon s. 19 of the latter Act. It is quite clear, upon the terms of that section, that separate property of a married woman as to which she is restrained from anticipation is not available by way of execution, even in the case of a judgment on an ante-nuptial contract by her, unless the restraint on anticipation is contained in a settlement of her own property made by herself. [He also cited *Downe* v. *Fletcher*. (2)]

A. P. Longstaffe, for the plaintiffs. It is submitted that the decision of the learned judge was correct. The plaintiffs cannot be prejudiced by the fact that the judgment as drawn up is in narrower terms than the plaintiffs were entitled to. In the case of *Robinson, King & Co.* v. *Lynes* (3) it was held that the personal liability of a married woman at common law upon contracts made by her before marriage is not affected by the Married Women's Property Act, 1882, and that the judgment in such a case is rightly signed against her personally, and not against her separate estate in the form used in *Scott* v. *Morley*. (4) Therefore the plaintiffs in this case were entitled to sign judgment against the defendant without any limitation as to execution. By s. 13 of the Married Women's Property Act, 1882, it is provided that a woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage, and that she may be sued for any such debt, and for any liability in damages or otherwise under any such contract, or in respect of any such wrong, and that all sums recovered

(1) (1889) 22 Q. B. D. 548.
(2) (1888) 21 Q. B. D. 11.
(3) [1894] 2 Q. B. 577.
(4) (1887) 20 Q. B. D. 120.

against her in respect thereof shall be payable out of her separate property. It is submitted that the operative part of s. 19 does not apply to the ante-nuptial, but only to the post-nuptial, debts or contracts of a married woman, and to cases in which the judgment is against her separate estate in respect of such debts and contracts.

J. S. Pritchett, for the defendant, was not called upon to reply.

MATHEW L.J. This appeal must be allowed. The judgment in this case was drawn up without reference to the provisions of the Married Women's Property Act, 1882, and as if the Married Women's Property Act, 1870, were applicable to the case. But that Act has been repealed, and the case depends on the construction of s. 19 of the Married Women's Property Act, 1882. The meaning of that section appears to me to be perfectly clear. It provides that "Nothing in this Act contained shall interfere with or affect any settlement, or agreement for a settlement, made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached, or to be hereafter attached, to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument; but no restriction against anticipation contained in any settlement, or agreement for a settlement, of a woman's own property, to be made or entered into by herself, shall have any validity against debts contracted by her before marriage, and no settlement, or agreement for a settlement, shall have any greater force or validity against creditors of such woman than a like settlement, or agreement for a settlement, made or entered into by a man would have against his creditors."

In the present case the debt was contracted by the defendant before marriage. An action having been brought, judgment was signed against her for the amount of the debt, as it appears to me, in the wrong form. Afterwards a deed of separation was executed by which the husband covenanted to

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pay certain monthly sums, for the separate use of the defendant, with a restraint on anticipation. It is obvious that this covenant does not come within the words "settlement, or agreement for a settlement, of a woman's own property to be made or entered into by herself"; and therefore the case is not within the exception created by the latter part of s. 19. It follows that, by virtue of the earlier part of the section, the sums covenanted to be paid are not available for the purposes of execution.

COZENS-HARDY L.J. I am of the same opinion. The case of *Axford* v. *Reid* (1) is no longer an authority, because the Act upon which it was decided has been repealed. If s. 13 of the Married Women's Property Act, 1882, stood alone, possibly the judgment as drawn up in the present case might be correct; but s. 13 must be read in conjunction with s. 19, which provides that nothing in the Act contained "shall interfere with or render inoperative any restriction against anticipation at present attached, or to be hereafter attached, to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument." That language appears to me perfectly clear and unambiguous. It was suggested that it has no application to the case of an ante-nuptial debt. But that suggestion is quite untenable, having regard to the latter part of the section, which provides that "no restriction against anticipation contained in any settlement, or agreement for a settlement, of a woman's own property, to be made or entered into by herself, shall have any validity against debts contracted by her before marriage." The first part of the section is a perfectly general enactment; and then there is a limitation of that enactment, providing that it shall not apply to a settlement by a married woman of her own property in the case of debts contracted before marriage. It appears to me clear, having regard to the terms of the section, that the form in which the judgment in this case was drawn up cannot be supported. It was suggested that *Robinson, King & Co.* v.

(1) 22 Q. B. D. 548.

Lynes (1) is a decision that, in the case of the ante-nuptial contract of a married woman, her property without exception is liable. Nothing appears to me to have been further from the minds of the judges who decided that case than such a notion. The action there was against a married woman upon a bill of exchange accepted by her before marriage. The only defence set up was coverture: and the answer to that defence was that a married woman's liability upon a contract entered into by her before marriage was not affected by the Married Women's Property Act, 1882. The decision does not touch the question what property can in such a case be made available by way of execution on a judgment against the married woman. For these reasons I think the application for amendment of the form of the judgment must be allowed, and the order for the appointment of a receiver set aside.

Appeal allowed.

Solicitors for plaintiffs: *Ward, Bowie & Co., for T. W. Walthall, Birmingham.*

Solicitors for defendant: *Hulberts, Hussey & Metcalf, for E. Docker Birmingham.*

(1) [1894] 2 Q. B. 577.

E. L.

C. A.
1903
Nov. 10.

[IN THE COURT OF APPEAL.]

CORNFOOT *v.* ROYAL EXCHANGE ASSURANCE CORPORATION.

Insurance (Marine)—Voyage Policy—Construction—Termination of Risk—Insurance for Period after Arrival of Ship—"Days," how to be Reckoned.

In a policy of marine insurance on a ship the insurance was described as being for a voyage to Algoa Bay "and for 30 days in port after arrival," and as continuing "until the ship with all her ordnance, tackle, apparel, &c., shall be arrived at as above upon the said ship, &c., until she hath there moored at anchor in good safety." The ship arrived in Algoa Bay, and was there moored at anchor in good safety at 11.30 A.M. on August 2, 1902. She remained in Algoa Bay until September 1, 1902, and was there totally lost through perils insured against at 4.30 P.M. on that day:—

Held (affirming the judgment of Bigham J.), that the expression "30 days" in the policy meant thirty consecutive periods of twenty-four hours, the first of which began to run at 11.30 A.M. on August 2; and, therefore, that the insurance had come to an end before the loss occurred.

APPLICATION for judgment, or a new trial, in an action tried before Bigham J. with a special jury. (1)

The action was brought upon a policy of marine insurance, the plaintiff claiming to recover from the defendants, as underwriters of the policy, for a total loss of his ship, the *Inchcape Rock*. The insurance was described in the policy, which was on a printed form, in the ordinary form of a Lloyd's policy, with blanks to be filled in, as being "at and from Portland, Oregon, by any route to Algoa Bay and for 30 days in port after arrival, however employed." By a subsequent part of the policy the insurance was described as continuing "until the said ship with all her ordnance, tackle, apparel, &c., shall be arrived at as above upon the said ship, &c., until she hath there moored at anchor in good safety." In the printed form the latter words originally ran "until she hath there moored at anchor 24 hours in good safety," but the printed words "24 hours" were struck through with a pen.

(1) See [1903] 2 K. B. 363.

The ship came into Algoa Bay on August 2, 1902, and there anchored. She remained there until September 1, 1902, when she was driven on shore by a heavy gale of wind, and totally lost. The jury, in answer to questions left to them by the learned judge, found that the ship was safely moored at anchor in Algoa Bay at 11.30 A.M. on August 2, 1902, and that she was totally lost at 4.30 P.M. on September 1, 1902. Upon those findings the learned judge gave judgment for the defendants. (1)

J. A. Hamilton, K.C., and *Leck*, for the plaintiff. Upon the true construction of the policy the additional period of thirty days did not begin to run until midnight on August 2. It is submitted that, according to the usual rules of construction, "days" in such a contract means "calendar days," and that there is no authority for the construction of the word as meaning "consecutive periods of 24 hours." The learned judge appeared to think that the construction contended for by the plaintiff involved an interval between 11.30 A.M. and midnight on August 2 during which the ship would be uninsured. No such difficulty arises. The true construction of such a policy as this is that there is an insurance up to a certain day fixed by the date when the ship arrives and is moored in safety, which would last up to midnight on the day of such mooring, and for an additional period of thirty days from that day. The reason for the alteration of the ordinary form by the erasure of the words "24 hours" is that, under the 94th section of the Stamp Act, 1891 (54 & 55 Vict. c. 39), a further duty is payable on the policy, if it covers any time beyond thirty days after the ship has been moored at anchor at her destination. The thirty days under that section would on the general principle of construction be exclusive of the day of mooring. It is submitted therefore that the intention must have been to cover the period ending with the day of

(1) [1903] 2 K. B. 363. The plaintiff applied for a new trial on the grounds that the findings of the jury were against evidence, and of misdirection, but the facts and arguments with regard to that branch of the case are omitted in the report, as only questions of fact were involved.

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mooring and thirty calendar days in addition to it. That construction gives a plain and certain effect to the contract, whereas the other construction may often involve extremely nice and doubtful questions of fact, such as have arisen in the present case, with regard to the exact times in the day when the operation of mooring the ship in safety was complete, and when the ship must be considered to have become a loss.

[They cited *The Katy*. (1)]

Scrutton, K.C., and *Loehnis*, for the defendants. Upon the plain meaning of the words of the policy the additional thirty days must begin to run from the moment when the ship has been moored in safety upon her arrival at the port of destination. The twenty-four hours mentioned in the ordinary printed form would clearly have done so. If the expression "30 days" in the policy does not mean thirty consecutive periods of twenty-four hours, the only alternative construction possible is that the day of the ship's arrival, for part of which she enjoys the protection of the policy after the voyage is at an end, must count as the first of the thirty days. The plaintiff's construction must involve the difficulty that there would be an interval between the arrival of the ship and the commencement of the thirty days, during which the ship would not be covered; for it is clear on the terms of the policy that, apart from the additional period of thirty days, the insurance ends upon the voyage ending and the ship being moored in safety at the port of destination.

[They cited *Mercantile Marine Insurance Co.* v. *Tithering-ton*. (2)]

J. A. Hamilton, K.C., in reply.

COLLINS M.R. This case turns on the true construction of the policy upon which the action is brought. The insurance is thereby expressed to be upon a ship "at and from Portland, Oregon, by any route to Algoa Bay and for 30 days in port after arrival, however employed." Then further on in the policy the risk is described as continuing "until the said ship with all her ordnance, tackle, apparel, &c., shall be arrived at

(1) [1895] P. 56. (2) (1864) 5 B. & S. 765.

as above upon the said ship, &c., until she hath there moored at anchor in good safety." The latter words define the point to which the insurance would have continued but for the introduction of the thirty additional days. The earlier clause which describes the insurance as lasting "for 30 days in port after arrival" involves the necessity for determining the period of "arrival," in order to ascertain when the additional thirty days began and ended. For this purpose reference must be made to the subsequent clause that fixes the point of time at which the ship is to be considered to have arrived. That point of time is when the ship was moored at anchor in good safety. From that point of time, and from no other, the additional thirty days must begin to run. That seems primâ facie to be the obvious and necessary construction of the policy. But, when one looks at the genesis of the particular form of expression adopted in this policy, the matter appears to me to become still clearer. The words as they originally stood in the printed form were "until she hath there moored at anchor 24 hours in good safety." Under a policy in that form the twenty-four hours would clearly have run from the time of day when the ship was safely moored. The parties in this case, with the object of avoiding thereby the payment of further duty under the Stamp Act, struck out the words "24 hours," and made the point of time from which the thirty days were to run the same as that from which the twenty-four hours would have run, if the policy had remained in the printed form. It appears to me clear, upon the true construction of the policy, that the period of thirty days therein mentioned began to run from the point of time in the day at which the ship must be considered to have arrived at Algoa Bay on August 2, namely, when she was moored in good safety, and therefore that it ended at the same time of the day on September 1. The jury have found that the ship was safely moored in Algoa Bay at 11.30 A.M. on August 2, 1902. The period of thirty days would therefore expire at the same hour on September 1. The jury have further found that the ship was lost at 4.30 P.M. on September 1, 1902. It follows that, upon the construction which I have placed upon the policy, the insurance had come to an end before the loss of

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the ship. For these reasons I think the application of the plaintiff must be dismissed.

MATHEW L.J. I am of the same opinion. The question in this appeal depends upon the meaning of the policy. The insurance is expressed by the policy to be "at and from Portland, Oregon, by any route to Algoa Bay and for 30 days in port after arrival." The "arrival" so mentioned in the earlier part of the policy is clearly defined in the subsequent part of it, which describes the risk as continuing "until the said ship with all her ordnance, tackle, apparel, &c., shall be arrived at as above upon the said ship, &c., until she hath there moored at anchor in good safety." The ordinary printed form of policy runs, "until she hath there moored at anchor 24 hours in good safety." It is admitted that, under a policy in that form, the period from which the twenty-four hours would begin to run must be the time in the day when the ship was moored in good safety. Then, why should a different mode of construction be adopted where the period of thirty days is substituted for that of twenty-four hours? It clearly was not intended that there should be an interval between the arrival of the ship and the commencement of the thirty days, during which the ship should be uninsured. It appears to me that, in order to give effect to the intention of the parties, the expression "30 days" in the policy must be construed as meaning, not thirty calendar days as contended by the plaintiff, but thirty consecutive periods of twenty-four hours after the arrival of the ship.

COZENS-HARDY L.J. concurred.

Application dismissed.

Solicitors for plaintiff: *Botterell & Roche.*

Solicitors for defendants: *Hollams, Sons, Coward & Hawksley.*

E. L.

[IN THE COURT OF APPEAL.]

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DOWDEN & POOK, LIMITED *v.* POOK.

Restraint of Trade—Covenant not to carry on a Business—Reasonableness of Restriction—Question, whether for Judge or Jury.

The question whether the terms of a covenant not to carry on a business go beyond what is reasonably necessary for the protection of the covenantee under the circumstances of the case is not a question for a jury, but is for the judge.

APPLICATION for judgment or a new trial in an action tried before Grantham J. with a jury.

The action was for damages for breach of covenant, and for an injunction to restrain the defendant from further breaches of the covenant.

The plaintiffs carried on the businesses of cider merchants and cordial manufacturers. By an agreement under seal dated June 14, 1901, and made between the plaintiffs and the defendant, the plaintiffs appointed the defendant to be the manager of the Newton Abbot department of their business upon certain terms, and the defendant covenanted with them that he would not, "either solely, or jointly with, or as manager or agent for, any other person or persons or company, directly or indirectly, carry on, or be engaged or concerned or interested in the business of a cider merchant, manufacturing chemist, or cordial compounder, nor permit or suffer his name to be used or employed in carrying on, or in connection with, the said business, for the term of five years after leaving the service of the company."

The defendant was afterwards dismissed from the employment of the company, and had, subsequently to his dismissal, committed breaches of the above-mentioned covenant by being engaged in carrying on the business of a cider merchant. (1)

(1) Ultimately nothing turned on the fact that the covenant referred to the businesses of a manufacturing chemist and that of a cordial compounder. It was suggested in the course of the argument that the covenant was clearly too wide in respect of them, and that it was not severable. It was contended on the other hand that the covenant was severable as regards the different businesses. But, as will be seen, it became unnecessary to deal with that point.

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The defence was set up that the covenant was void as being in restraint of trade. Evidence was given at the trial with regard to the nature and extent of the plaintiffs' business, which, as will be seen from the judgments, shewed, in the opinion of the Court of Appeal, that the plaintiffs' business was not of such a character as to render so wide a restriction as that imposed by the covenant reasonably necessary for the protection of the plaintiffs. The learned judge at the trial left to the jury the question whether the covenant was wider than was necessary for the protection of the plaintiffs' business. The jury answered that question in the affirmative. The judge, however, on further consideration, was of opinion that the question whether the covenant was reasonable, having regard to the circumstances, was for him and not for the jury; and held that the covenant was reasonable, and therefore not void as being in restraint of trade. He therefore gave judgment for the plaintiffs, and granted an injunction as claimed.

Clavell Salter, for the defendant. The question whether, having regard to all the circumstances of the case, the restriction imposed by the covenant was reasonably necessary for the protection of the plaintiffs' business, was a question of fact for the jury, and was rightly left to them by the judge; and there was evidence to support their finding on that question. There was really no evidence on which the jury could have found otherwise than they did. The law on the subject of restraint of trade has been greatly modified, if not revolutionized, in the course of time by the current of the decisions on the subject; and, whatever may have been the views expressed in former times by Courts of first instance, the considerations which determine the question whether a covenant is or is not void, as being in restraint of trade, are now established to be such as necessarily form matters for the decision of a jury. This covenant must, it is submitted, be construed as unlimited as to space. There is nothing in its terms to limit it to the United Kingdom or to any other area; and, that being so, there is no principle on which any such limitation can be read into it by the Court. The Court cannot mould the covenant

for the parties, so as to make it reasonable: *Mills* v. *Dunham.* (1) It is now settled by the judgment of the House of Lords in *Nordenfelt* v. *Maxim-Nordenfelt Guns and Ammunition Co.* (2) that the question whether such a covenant is valid depends upon the question whether, having regard to the nature and extent of the covenantee's business, the number of his customers, and other such circumstances, it is reasonably necessary for the protection of the covenantee. It is a question of the proportion borne by the extent of the restriction to that of the business. Such matters as the nature and extent of the business, and the conditions under which it is carried on, with regard to which there may be a conflict of testimony, and which involve business considerations, are essentially matters for a jury. It would appear from what was said in *Tallis* v. *Tallis* (3) that this point cannot be considered as concluded by authority. A great many of the decisions on this subject have been in the Court of Chancery, or in the Chancery Division. Those decisions cannot be prayed in aid as tending to shew that the matter is one of law for the judge, for in Courts of Equity the judge is judge both of law and fact, and it was therefore unnecessary in those cases to distinguish between questions of law and fact.

Assuming that the question whether the covenant was reasonable was one of law for the judge, and not for the jury, it is submitted that the ruling of the learned judge was wrong, and that, upon the evidence given at the trial, it is clear that, having regard to the character of the plaintiffs' business, this covenant is a great deal wider than was reasonably necessary for the protection of the plaintiffs. There may be businesses of a world-wide character, such as was that in the case of *Nordenfelt* v. *Maxim-Nordenfelt Guns and Ammunition Co.* (2), in which a covenant of this kind, unrestricted in point of space, may be reasonable; but the evidence shews clearly that the plaintiffs' business was not of such a character, and that the restriction imposed by this covenant was disproportionate to the extent of the business. [He cited *Underwood & Son* v.

(1) [1891] 1 Ch. 576. (2) [1894] A. C. 535.
(3) (1853) 1 E. & B. 391.

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Barker (1); *Haynes* v. *Doman* (2); *Hitchcock* v. *Coker* (3); *Badische Anilin und Soda Fabrik* v. *Schott* (4); *Allsopp* v. *Wheatcroft.* (5)]

Foote, K.C., and *Simey*, for the plaintiffs. The judge was right in holding that the question whether the covenant was reasonable, or was unnecessarily wide and therefore void, was for himself, and not for the jury. The question in such cases is whether the covenant is against public policy, and therefore illegal; and that cannot be a question for the jury, but must be one of law for the judge. It may depend on mixed considerations of fact and law; but in that respect it is only analogous to other questions which are clearly for the judge, and not for the jury, such as the question of reasonable and probable cause in an action for malicious prosecution. It may be that it would be proper in cases where there is a conflict of evidence as to matters of fact, upon which the answer to the question whether the covenant is reasonable may depend, to leave such matters to the jury; but the authorities clearly shew that the question whether the covenant is reasonable is for the judge: see *Mitchel* v. *Reynolds* (6); *Mallan* v. *May* (7); *Tallis* v. *Tallis* (8); *Haynes* v. *Doman* (2); *Davis* v. *Mason.* (9) There does not appear to be any instance in which the question whether a contract, proved to have been in fact entered into, was unenforceable on the ground of its being in restraint of trade, or any other ground of public policy, has been left to a jury.

Assuming that the question was for the jury, the burden of proving that the covenant was unreasonable lay on the defendant: *Badische Anilin und Soda Fabrik* v. *Schott.* (4) It is submitted that the evidence in the present case was not sufficient to discharge that burden.

Thirdly, assuming the question to have been for the judge, it is submitted that his conclusion upon the evidence was

(1) [1899] 1 Ch. 300.
(2) [1899] 2 Ch. 13.
(3) (1837) 6 A. & E. 438; 45 R. R. 522.
(4) [1892] 3 Ch. 447.
(5) (1872) L. R. 15 Eq. 59.
(6) (1711) 1 P. Wms. 181.
(7) (1843) 11 M. & W. 653; 63 R. R. 708.
(8) 1 E. & B. 391.
(9) (1793) 5 T. R. 118; 2 R. R. 562.

correct. Having regard to the circumstances, there is ground for contending that the parties only contemplated that the covenant should apply to the United Kingdom, and that it should be so construed; but, assuming that it applies to foreign countries, it would appear from the authorities that the scope of the doctrine that restraints on trade are against public policy was never treated as including considerations with regard to restraint on trading in foreign countries: see per Lord Herschell L.C. and Lord Macnaghten in *Nordenfelt* v. *Maxim-Nordenfelt Guns and Ammunition Co.* (1) Therefore it is contended that, assuming that this covenant would be reasonable, if it applied to the whole of the United Kingdom, the fact that it also applies to foreign countries would not make any difference.

[They cited *Rousillon* v. *Rousillon* (2); *Ward* v. *Byrne.* (3)]

Clavell Salter, in reply.

COLLINS M.R. This is an appeal from the judgment of Grantham J., who ignored the finding of the jury in a case tried before him with a jury, and gave judgment for the plaintiffs, awarding them an injunction against the defendant. The action was brought upon a covenant contained in an agreement between the plaintiffs, as employers, and the defendant, as their employee, by which the plaintiffs undertook to employ the defendant as the manager of the Newton Abbot department of their business, and the defendant undertook that he would not carry on, or be engaged or concerned in, the business of a cider merchant, manufacturing chemist, or cordial compounder, for the term of five years after leaving the service of the company. The defendant had been dismissed from the plaintiffs' service, and it was proved that he had subsequently committed breaches of the before-mentioned covenant. The defence was set up that the covenant was void as being in restraint of trade, because the restriction thereby imposed on the defendant was wider, even according to modern standards, than was reasonably necessary for the protection of the plaintiffs in their business. The jury took that view, and found

(1) [1894] A. C. 535, at pp. 550, 574.
(2) (1880) 14 Ch. D. 351.
(3) (1839) 5 M. & W. 548; 52 R. R. 827.

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that the covenant was wider than was necessary for the plaintiffs' protection. The learned judge on further consideration came to the conclusion that the question was not properly one for the jury, and that, having regard to the evidence given at the trial, the covenant was not unnecessarily wide; and he therefore gave judgment for the plaintiffs, granting them an injunction which would restrain the defendant from carrying on any of the businesses specified in the covenant in any part of the world. If we thought that the case was properly one for the jury, we might have some difficulty in dealing with it upon their finding, because the learned judge reports to us that, in his opinion, the verdict cannot be relied on as satisfactory, and that he observed indications of bias on the part of the jury. Such an expression of opinion on the part of the judge who tried the case would be entitled to great weight with us, and therefore, if the matter depended on the verdict of the jury, there might be ground for a new trial. That raises the point which has been argued before us; namely, whether the question decided by the jury, that is in substance, whether the covenant was reasonable or not, was one for them. It appears to me that from a very early stage down to the present time that question has really always been treated as being one for the Court, and not for the jury. It is, in my opinion, a question of law. No doubt there may be matters of fact, forming elements in the determination of the question, which, if they are in dispute, may have to be ascertained through the medium of the jury; but it is beyond their province to determine whether the restriction imposed by the covenant is reasonable or not. In *Mitchel* v. *Reynolds* (1) Lord Macclesfield stated the rule on the subject in terms substantially the same as those in which it has been repeatedly stated in subsequent cases. He said, in delivering judgment in that case: "To conclude: in all restraints of trade, where nothing more appears, the law presumes them bad; but, if the circumstances are set forth, that presumption is excluded, and the Court is to judge of those circumstances, and determine accordingly; and if, upon them, it appears to be a just

(1) 1 P. Wms. 181.

and honest contract, it ought to be maintained." It seems to me clear that, by the word "Court" in that passage, the judge and not the jury is meant. In the case of *Mallan* v. *May* (1) this very point appears to me to have been decided. In that case a plea to a declaration upon a covenant of the kind now in question set out certain facts, and then alleged that the covenant was an unreasonable restriction of trade; and the plea as regards the latter allegation was held bad for attempting to put in issue matter of law; namely, the reasonableness of the restriction. The Court decided the question whether the covenant was reasonable or not as one of law, and negatived the suggestion that it was for the jury. That case was followed by the case of *Tallis* v. *Tallis* (2), in which the judges in discussing the matter recognised the logical difficulty of saying that the question of the reasonableness of the covenant is for the judge and not for the jury, but appear to have treated the decision in *Mallan* v. *May* (1) as a binding authority. It has been suggested that the current of the more modern authorities has been such as to establish the contrary of what was held to be the rule in those cases; that there has been a gradual process of evolution, and that conditions have now become so altered that the old law on the subject has been altered. In my opinion there is no foundation for that suggestion. There may have been a change in the view taken in these cases, by which the area of the possible validity of these restrictions has been enlarged; but I do not think that there has been anything which could affect the question as to the respective provinces of the judge and the jury in such cases. In former times there appears to have been a notion that a restriction which in form was universal was necessarily bad. A difference of opinion arose as to this, some thinking that that view put the matter too high, and that in such cases there was only a vehement presumption that the restriction was unreasonable, but not an irrebuttable presumption to that effect. There was, however, a long series of cases in all of which, the restriction being limited, the question, whether, under the particular circumstances of the case, it was reasonable

(1) 11 M. & W. 653; 63 R. R. 708. (2) 1 E. & B. 391.

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or not, appears to have been treated as a question of law. I do not think that the modern view—namely, that a restriction, even though universal, may be reasonable under special circumstances—has altered in any way the essential nature of the considerations upon which these cases depend, or has made any difference which can affect the old rule that the question of the reasonableness of the covenant is for the judge. For these reasons I think that the question whether the covenant in this case was reasonable was for the judge, and not for the jury.

That brings me to the question whether the decision of the learned judge was right in point of law. There was evidence, which was perfectly relevant to the inquiry and which was therefore properly admitted, as to the nature of the plaintiffs' business, the number and situation of their customers, and other matters, all of which were circumstances proper to be considered by the tribunal which had to decide the question whether the covenant was reasonable. If there had been any substantial controversy as to these matters there might have been questions of fact for the jury to decide; but, in point of fact, there does not appear to me to have been any such controversy in the present case as to raise any issue for the jury to decide. The plaintiffs' books were produced and spoke for themselves with regard to the extent and nature of their business. It does not appear to me to have been what by any stretch can be called a very large business, and the great bulk of the customers were in England, though there were a few elsewhere. It appears to me impossible to say that, for the protection of that business, a covenant applying to the whole world was necessary. I therefore think that the covenant sued upon was so wide as to be unreasonable. The jury were of opinion that it was so, though the learned judge appears to have thought that their finding was not altogether worthy to be relied upon as impartial. Apart entirely from the intervention of the jury, I do not think that there was any evidence in this case to support the conclusion that the restriction imposed by the covenant was a reasonable one. For these reasons I think the appeal must be allowed and judgment entered for the defendant.

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MATHEW L.J. I am of the same opinion. With reference to the question whether it is within the province of the judge, or that of the jury, to decide as to the reasonableness of the covenant, we start with the clear rule of law that, in general, a contract in restraint of trade is illegal; and therefore, in the case of an action upon such a contract, it would be the duty of the judge, upon ascertaining the nature of the contract, to withdraw the question from the jury. Upon the general rule there is engrafted a qualification depending upon the character of the restriction in relation to the circumstances of the particular case. Such a contract may be valid if, having regard to those circumstances, it is reasonable. The question is, within whose province it falls to say whether the restriction in a particular case comes within the general rule or the qualification of that rule. Clearly, I should say, within the province of the tribunal whose duty it would be, in the absence of any special circumstances, upon the construction of the contract to declare it to be illegal. The authorities support that view. They have been sufficiently discussed by the Master of the Rolls, and I will not refer to them further than to say that they appear to me to point to the conclusion that, where the question of the reasonableness of the restriction imposed by the covenant has been raised, it has always been dealt with as a question of law for the Court. No instance has been adduced in which upon such a question the aid of a jury has been invoked.

The question being, therefore, for the judge, we have to say whether his conclusion was correct or not. I think there can be no doubt that the covenant in this case prohibited the defendant from carrying on the business therein specified in any part of the world—for instance, in America, or in any of the colonies or dependencies of the Crown. Now what was the nature of the business which is alleged to have required a protection of this sweeping character? It appears in fact to have been a cider business substantially carried on in the particular locality in which the defendant was employed to act as manager. I think it is impossible to hold that, for the protection of that business, it was necessary that the defendant should be

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restrained for the term of five years from carrying on the business described in the agreement in any part of the world.

COZENS-HARDY L.J. I am of the same opinion. Questions relating to restraint of trade appear in recent times to have been generally dealt with in the Court of Chancery, or the Chancery Division, where there is no separation between the functions of judge and jury; so that it is necessary to go back a good while in order to find any authority on the question whether it is for the judge or the jury to decide as to the reasonableness of the restriction imposed by a covenant such as that here in question. It appears to me that the authorities referred to by the Master of the Rolls are clear on the point, and I will only refer to one passage from the judgment of the Court in the case of *Mallan* v. *May* (1), which was delivered by Parke B. He said: "We need hardly add, that the latter part of the seventh plea, which is pleaded to that breach, is bad, for the cause assigned for special demurrer. It attempts to leave matter of law, viz., the reasonableness or unreasonableness of the contract, to the jury. This is clearly a question of law, and was decided as such in *Davis* v. *Mason* (2), *Horner* v. *Graves* (3), *Proctor* v. *Sargent* (4), and *Chesman* v. *Nainby*. (5)" The latter case appears to have gone to the House of Lords, and been decided by them in 1727. So the law on this subject seems to have been established so long as nearly two centuries ago. The question is really one of public policy, which is not a question of fact for a jury, but of law for the judge. No doubt the judge who has to decide the question has to consider the particular circumstances of the case. In most cases these probably either would be formally admitted, or would not substantially be in dispute; but of course cases might be imagined, in which it might be necessary, in order to enable the Court, as a matter of law, to say whether the covenant was reasonable, that evidence should be given as to such matters as the nature

(1) 11 M. & W. 653; 63 R. R. 708.
(2) 5 T. R. 118; 2 R. R. 562.
(3) (1831) 7 Bing. 735; 33 R. R. 635.
(4) (1840) 2 M. & G. 20; 58 R. R. 342.
(5) (1726) 2 Str. 739; 2 Ld. Raym. 1456.

and extent of the business to be protected; and, if such evidence were so far conflicting that a serious issue of fact were raised, it might be proper for the judge to leave that issue to the jury, if the case were tried with a jury. In the present case there does not appear to me to be any such issue, and I think the Court has before it all the materials necessary to enable it to decide, without the intervention of a jury, the question whether the covenant sued upon is reasonable or not. In dealing with that question it is first of all necessary to decide what is the true construction of the covenant. On the construction of the covenant in this case I cannot doubt that it imposes a world-wide restraint. I can see no ground for limiting its operation to the United Kingdom. I think it must stand or fall as being a covenant prohibiting the defendant from carrying on the businesses in question in any part of the world. The question whether such a covenant is valid depends upon the question whether it could really be necessary for the protection of the particular business carried on by the plaintiffs. There may be some businesses of such a character that a covenant of this kind might not be unreasonable with regard to them; but the question is whether it can be said to be reasonable with regard to the plaintiffs' business. Now what was the nature and extent of that business? The critical period, at which to look, is the time when the covenant was entered into. The share capital of the company appears to have been somewhere about 5000*l.*, but I gather that a large part of the shares were taken to be fully paid up. It was stated that about 4000*l.* had been raised on debentures. Taking the most favourable view, the capital does not appear to have been more than about 9000*l.*, and it probably was really less. The number of the company's customers was not great, being somewhere about 1200, mostly local. In substance, it may be described as a not very large cider business in the West of England. It appears to me to be impossible to say that, for the protection of a business of this kind, and limited as this business was, it was reasonably necessary that the defendant should be restrained from carrying on business as a cider merchant in any part of the world. For these reasons I think

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that, as a matter of law, the covenant sued upon was invalid, and our judgment must be for the defendant.

Application to enter judgment for defendant allowed.

Solicitors for plaintiffs: *Mann & Crimp, for Hacker, Michelmore & Bewes, Newton Abbot.*

Solicitors for defendant: *Dunn, Baker & Baker, for Dunn & Baker, Exeter.*

E. L.

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[IN THE COURT OF APPEAL.]

FRASER *v.* FRASER.

Practice—Appeal—Reference of Action to Master—Order XIV., r. 7.

Where an action is referred to a master under Order XIV., r. 7, an appeal does not lie from his decision direct to the Court of Appeal.

Query, whether in such a case an appeal will lie to the Divisional Court.

APPEAL by the defendant against the decision of a master in an action referred to him under Order XIV., r. 7.

The action was for the balance of an account. The defendant set up a counter-claim for money paid by him for the plaintiff. The plaintiff having applied for liberty to sign judgment under Order XIV., a judge at chambers, with the consent of the parties, referred the action to a master under rule 7 of the order. The master decided that a balance was due from the defendant to the plaintiff, and ordered judgment to be entered accordingly.

Trevor F. Lloyd, for the plaintiff, took a preliminary objection to the appeal. The appeal will not lie. There is no appeal from the decision of a master under Order XIV., r. 7; or, if there is any appeal, it is to the Divisional Court. The rule provides that, by consent of the parties, the action may be referred to a master. What is contemplated is a reference to the master, not as an officer of the Court, but as an arbitrator consented to by the parties. If that be so, his decision is final, except in cases where the award of an arbitrator at

common law might be questioned. But, assuming that the reference to the master under the rule is to be treated as a reference to an official or special referee within ss. 13 to 17 of the Arbitration Act, 1889, then by virtue of Order XL., rr. 6, 6*a*, the appeal would be to the Divisional Court: *Wynne-Finch* v. *Chaytor* (1); see also Order LIX., r. 3.

Hume-Williams, *K.C.*, and *J. W. McCarthy*, for the defendant. The words "with the consent of the parties" in the rule do not import that the parties consent to be finally bound by the master's arbitrament in the cause, but merely that they consent to that mode of trial, instead of the cause being put into the short cause list: *Darlington Wagon Co.* v. *Harding*. (2) Therefore, the master is not in the position of a common law arbitrator selected by the parties. Nor is he in the position of an official or special referee within the meaning of the Arbitration Act, 1889. If the intention had been that he should be in that position, words would have been inserted in Order XIV. to that effect. Rule 7 is part of the code of rules relating to the subject dealt with by Order XIV., and must be construed in connection with the other rules of that order. The provisions of rule 7 as to reference to a master are by way of supplement to the power given to the judge of dealing with the action by putting it into the short cause list. There may be cases, coming within Order XIV., which are not altogether suitable to be sent into the short cause list for trial, because they involve matters of account, or other such matters as require a somewhat fuller investigation, and may be more conveniently dealt with by a master. Therefore the rules give alternative courses. The judge may send the case into the short cause list to be tried by himself or another judge, or, instead of adopting that course, he may, with the consent of the parties, refer the action to the master for trial. It is submitted that the master acts in such a case as the substitute of the judge, and his decision is subject to the same incidents as that of the judge would be; and it was not intended that, if the second alternative were adopted, the party should be deprived of the right of appeal which he would have had if the case had been put into

(1) [1903] 2 Ch. 475. (2) [1891] 1 Q. B. 245.

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the short cause list. If this be so, an appeal lies to this Court by virtue of the Judicature Act, 1873, s. 19, the Judicature Act, 1890, s. 1, and Order XXXIX., r. 1. [He cited *Hoare & Co.* v. *Morshead* (1); *Owen* v. *London and North Western Ry. Co.* (2); *Sandback Charity Trustees* v. *North Staffordshire Ry. Co.* (3)]

Trevor F. Lloyd, for the plaintiff, in reply.

COLLINS M.R. This is an appeal from the decision of the master on a matter referred to him under Order XIV., r. 7. That rule is in these terms: "Upon the hearing of the application, with the consent of the parties, an order may be made referring the action to a master, or the action may be finally disposed of without appeal in a summary manner." In this case an order was made by a judge to the effect that, under Order XIV., r. 7, with the consent of the parties, an action should be referred to the decision of the master. In pursuance of that order, the master heard the case, and gave his decision upon it; and against that decision the defendant seeks to appeal. A preliminary objection to the appeal is taken on the grounds, first, that there is no appeal, and, secondly, that, if there is an appeal, it does not lie directly to the Court of Appeal. I have come to the conclusion that no appeal lies directly to this Court. The rule provides that an order may be made "referring the action to a master." Those words, in my opinion, plainly involve that, in some form or other, there is to be a "reference" to the master with the consent of the parties. It seems to me that the language, primâ facie at all events, imports that there is to be, either a reference at common law, in which case there would be no appeal from the decision of the master, or a reference within the statutory provisions as to references contained in the Judicature Acts and ss. 13 to 17 of the Arbitration Act, 1889, in which case any appeal would have to be made to the Divisional Court. In neither of these cases would there be an appeal direct to this Court. Upon that view of the rule, the question whether

(1) [1903] 2 K. B. 559. (2) (1867) L. R. 3 Q. B. 54.
(3) (1877) 3 Q. B. D. 1.

there is any appeal at all against the decision of the master under Order XIV., r. 7, does not arise, and, therefore, it is not necessary in the present case to decide it. That being so, I do not think it desirable to express any opinion upon it, and I base my judgment on the ground that, assuming that there may be an appeal, it does not lie direct to this Court. Looking at the purview of the rule as a whole, there may be a good deal to be said in favour of the view that the framers of it did not intend that there should be any appeal from the decision of the master. But, if that was their intention, I do not think that they have expressed it so clearly as in that case I should have expected. It may possibly be contended that the words "without appeal" govern the construction of the whole of the rule. It may be argued in support of that view that the use of the word "referring" in conjunction with the expression "with the consent of the parties" indicates that such was the intention. However, as I have said, I am not prepared to give any opinion on the question whether the terms of the rule exclude the possibility of any appeal from the decision of the master. The rule certainly, I think, provides for a "reference," and that must mean, either a reference at common law, or a reference within the statutory provisions to which I have alluded, in neither of which cases would there be an appeal direct to this Court. I cannot see any alternative. It was very ingeniously argued by the defendant's counsel that another construction ought to be put upon the rule. It was suggested that the provision for a reference to the master was by way of supplement to the convenient practice by which cases may be dealt with under Order XIV., r. 8. Under that rule causes, in which leave to defend is given, and in which the judge is of opinion that a prolonged trial is not requisite, may be put into the short cause list. It was suggested that there are cases under Order XIV. in which that procedure is not altogether suitable, and which call for some further remedy—cases which cannot be disposed of quite so cursorily, and which require a somewhat fuller investigation than can conveniently be made on the trial of a case in the short cause list; and that rule 7 was intended to meet those

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cases, by providing that, instead of putting the case into the short cause list, the judge may, with the consent of the parties, substitute the decision of it by a master. It is argued that on that view the decision of the master is really in substitution for the decision of the judge on the trial of the cause, with the effect of retaining all those rights of appeal which there would have been in the case of such a decision. That argument is very ingenious, but I do not think that the language of the rule affords any basis for it. As I have already said, I think the words of the rule plainly import that the action is to be "referred," and by that, in my opinion, must be meant, either a reference at common law, or a reference within the statutory provisions which I have mentioned. The result is that this appeal will not lie.

MATHEW L.J. I am of the same opinion. I do not think it would be possible, without substantially altering the language of the rule, to adopt the construction contended for by the defendant's counsel. That construction appears to me to involve the insertion, after the words "referring the action to a master," of some words importing that, in dealing with the case, the master is to be deemed to exercise the functions of a judge; the result of which would be that there might in every such case be an appeal to the Court of Appeal from his decision on any question either of law or fact. I cannot think that the language of the rule admits of such a construction. Then what is the effect of the rule, and the position of the master under it? It was urged for the plaintiff that, under this rule, the master is merely in the position of an arbitrator at common law, and his decision is therefore final, except in cases where the decision of such an arbitrator could be questioned. I hesitate to decide that, because it is not, I think, really necessary in this case; but I have been impressed by the argument in favour of that construction of the rule. It has, however, been pointed out that there is an alternative view, namely, that the reference is to the master as an officer of the Court, and that, although there is no repetition in the rule of the statutory provisions with regard to an official

referee, his position must be considered as analogous to that of such a referee, and subject to the same incidents, including the right of appeal. But, if that contention be correct, the result is that any appeal from the master's decision must be, not to this Court, but to the Divisional Court.

COZENS-HARDY L.J. I agree. The words used in the rule are "referring the action to a master." Those words do not appear to me to be appropriate, if the intention were that the action should be tried by the master in substitution for the judge. They appear to me clearly to indicate a reference to a person who is to be an arbitrator, or in the nature of an arbitrator. I can, therefore, see nothing in the terms of the rule to justify an appeal direct to this Court. Whether there can be an appeal to a Divisional Court, it is unnecessary to decide, and I desire to express no opinion on that question.

Appeal dismissed.

Solicitors for plaintiff: *Harratt & Pollock.*
Solicitors for defendant: *Williams & Neville.*

E. L.

C. A.
1903
Oct. 28.

[IN THE COURT OF APPEAL.]

CHESTERFIELD RURAL DISTRICT COUNCIL *v.* NEWTON AND OTHERS.

Highway—Repair—Extraordinary Traffic—Action that could have been brought in County Court—Action in High Court—Costs on High Court Scale—Locomotives Act, 1898 (61 & 62 *Vict. c.* 29), *s.* 12, *sub-s.* 1 (*a*).

A highway authority, acting on the certificate of their surveyor, brought an action in the High Court to recover the expenses incurred by reason of extraordinary traffic for which the defendant was responsible. The amount certified by the surveyor and claimed in the action exceeded 250*l.*, but the verdict of the jury was for 60*l.*, and judgment was entered for that amount with costs. The costs were taxed on the High Court scale. On appeal from the refusal of a judge at chambers to order a review of taxation:—

Held, that the jurisdiction of the High Court to try the action was not affected by the provision of s. 12, sub-s. 1 (*a*), of the Locomotives Act, 1898, that expenses not exceeding 250*l.* may be recovered in the county court, and that the taxation of costs was rightly made on the High Court scale.

APPEAL by the defendant Newton from an order of Walton J. at chambers.

The plaintiffs, as the highway authority, received from their surveyor a certificate that extraordinary expenses, to the amount of 732*l.*, had been incurred by them in repairing a highway within their district, by reason of the damage caused by extraordinary traffic. They thereupon brought an action in the High Court against the defendant Newton and two other defendants to recover 732*l.* The other defendants settled with the plaintiffs, and the action proceeded against the defendant Newton alone. It was tried before Ridley J. and a jury, and the finding of the jury was that damage had been caused by excessive weight and extraordinary traffic to the amount of 120*l.* It had been agreed that the defendant Newton was liable for one-half the amount of the damage, and the finding of the jury therefore amounted to a verdict against him for 60*l.*, and the learned judge entered judgment

for the plaintiffs for that amount with costs, and stated that, if it were necessary and if he had the power, he would certify that the case was one that was properly tried in the High Court. Upon taxation the master taxed the plaintiffs' costs against the defendant Newton on the High Court scale, and his decision was affirmed on appeal by the learned judge.

The defendant Newton appealed.

Bonner, for the defendant Newton. The plaintiffs are not entitled to costs on the High Court scale. The Locomotives Act, 1898, by s. 12, sub-s. 1 (*a*), directs that the expenses mentioned in s. 23 of the Highways and Locomotives Act, 1878, "shall cease to be recoverable in a summary manner, but may be recovered if not exceeding two hundred and fifty pounds in the county court, and if exceeding that sum in the High Court." The context shews that the word "may" should be read "must," and the effect is to assign actions not exceeding 250*l.* to the county court. The test whether a case comes within the jurisdiction of the county court is not the amount claimed, but that which is recovered: *Solomon* v. *Mulliner*. (1) There was no power to give a certificate that the action was properly brought in the High Court, because s. 116 of the County Courts Act, 1888, does not apply to this case. The action is not for a tort: *Hill* v. *Thomas* (2), in which Bowen L.J. pointed out that the object of the Locomotives Acts is not to prohibit extraordinary traffic, but to lay the extra expense of damage done by such traffic on the right shoulders. The case arises out of a statutory right to recover expenses. That fact takes it out of s. 5 of the Judicature Act, 1890, which gives discretion over costs to a Court or judge, but excepts the case of express provisions in any statute. Here there is a statutory enactment that the case must be tried in the county court. The judge having no power over the costs, and the action being one assigned to the county court, the taxation of costs on the High Court scale was wrong.

Etherington Smith and *T. Hollis Walker*, for the plaintiffs.

(1) [1901] 1 K. B. 76. (2) [1893] 2 Q. B. 333, at p. 340.

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The Locomotives Act, 1898, is permissive as to claims not exceeding 250*l*. They may be brought in the county court, but the jurisdiction given to that Court does not exclude that of the High Court. The foundation of the action is the certificate of the surveyor. If that does not exceed 250*l*. the action may be brought in the county court, but if it is for a larger amount the authority is bound to bring the action in the High Court for the amount of the certificate. This explains why the statute is silent as to costs, and contains no provisions analogous to those in s. 116 of the County Courts Act, 1888. There being no statute to the contrary, the judge had jurisdiction over the costs under s. 5 of the Judicature Act, 1890, or, if that section is not applicable, the action was tried with a jury, and the plaintiffs are entitled to costs under Order LXV., r. 1, unless an order is made to the contrary for good cause shewn; and no such order was made. The amount recovered in this case, even assuming it to be an action for a tort, would render a certificate unnecessary, and, further, the judge gave a certificate if one was necessary. There is nothing, therefore, in the case that affects the plaintiffs' right to costs on the High Court scale.

Bonner, in reply.

COLLINS M.R. I am of opinion that this appeal fails. The question before us arises under the Highways and Locomotives Act, 1878, and the amending Act of 1898. The former, by s. 23, enacts that where, by a certificate of their surveyor, it appears to the highway authority that extraordinary expenses have been incurred in repairing a highway, by reason of the damage caused by excessive weight passing along the same, or extraordinary traffic thereon, the authority may recover in a summary manner from any person, by whose order such weight or traffic has been conducted, the amount of the expenses proved, to the satisfaction of the Court having cognizance of the case, to have been incurred by the authority by reason of the damage so arising. The main provisions of that Act stand, but the particular mode in which the remedy is to be enforced has been dealt with by s. 12, sub-s. 1 (*a*), of

the Locomotives Act, 1898, which enacts with respect to s. 23 of the previous Act that "expenses under that section shall cease to be recoverable in a summary manner, but may be recovered if not exceeding two hundred and fifty pounds in the county court, and if exceeding that sum in the High Court." It has been pointed out that a condition precedent to the right to bring an action to recover the expenses is that there shall be a certificate of the surveyor that extraordinary expenses have been incurred by reason of damage caused by excessive weight or extraordinary traffic. That certificate was given in this case, and the amount of the expenses was stated to be 732*l*. The authority accordingly brought this action, against the defendant who appeals and two other defendants, to recover the amount stated in the certificate. The other defendants settled the claims against them, and the jury found that the amount of the expenses recoverable was 120*l*. It had been agreed that the defendant who appeals was liable for one-half the expenses, and consequently the amount he would have to pay under this verdict was 60*l*., and judgment was given for this sum with costs. The learned judge said that, if it were necessary to do so, he certified that the action was one that was properly brought in the High Court. The costs were accordingly taxed on the High Court scale, and the learned judge at chambers refused an application to review the taxation, and this appeal is against his decision.

It is said on behalf of the defendant that the learned judge at the trial had no discretion as to the scale on which costs should be allowed, because there was an absolute provision in s. 12, sub-s. 1 (*a*), of the Locomotives Act, 1898, that expenses not exceeding 250*l*. were to be recovered in the county court, and that the word "may" in the section should be read as "must." It is further said that, though a sum of 732*l*. was claimed in the action, the result shews that the claim should have been for 120*l*., and that sum being less than the 250*l*. mentioned in the section, the action ought to have been brought in the county court, and costs could only be recoverable on the county court scale. It seems to be clear that the action could have been brought in the county court; but it is

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equally clear that it was one which the High Court had jurisdiction to entertain, the claim being on the face of it for an amount over 250*l*. For the plaintiffs it is contended that Order LXV., r. 1, is applicable under the circumstances of the case. That order provides that "subject to the provisions of the Acts and these rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge," with the proviso that "where any action, cause, matter, or issue is tried with a jury, the costs shall follow the event, unless the judge by whom such action, cause, matter, or issue is tried, or the Court, shall, for good cause, otherwise order." It is contended that, in this action, the High Court having jurisdiction, and the action having been tried with a jury, the costs must follow the event unless something is shewn which deprives the successful party of that right. It was further contended that though there was a provision under which the action might have been brought in the county court, there was no statutory provision governing the question of costs in cases where an action of this kind that might have been brought in the county court was in fact brought in the High Court.

In my opinion it is clear that in the absence of special legislation the mere fact that the action could have been brought in the county court does not negative the right of the High Court to deal with the costs. The only special legislalation that can be applicable is that contained in s. 116 of the County Courts Act, 1888. I think that we ought to follow the current of authorities, and not bring within that section matters that are not technically either tort or contract. Assuming, as argued on behalf of the defendant, that the claim in this action is not one for a tort, it follows that s. 116 has no application, and as the question of costs is not the subject of special legislation, it is subject to the provisions of Order LXV., r. 1. If it can be said that the acts on which the claim in the action is based were in their nature extravagant and excessive, and so could be properly described as tortious, then, if the amount recovered had been such that a certificate

would be required that there was sufficient reason for bringing the action in the High Court, one has been given. If no certificate is required because the amount recovered is beyond the limit mentioned in s. 116 of the County Courts Act, 1888, the costs follow the event unless cause is shewn to the contrary. In any event, therefore, the taxation of costs on the High Court scale was right. I only desire to add that s. 5 of the Judicature Act, 1890, is not applicable in this case, which is provided for by a rule of Court, namely, Order LXV., r. 1, and is, therefore, excluded from the operation of the section.

For these reasons I am of opinion that the decision of the learned judge was right, and that the appeal should be dismissed.

MATHEW L.J. concurred.

Appeal dismissed.

Solicitors for plaintiffs: *Stevens, Son & Parkes, for Jones & Middleton, Chesterfield.*

Solicitors for defendant: *Stanley Evans & Co.*

A. M.

1903
Oct. 26.

In re MORGAN.
Ex parte THE BOARD OF TRADE.

County Court — Practice — High Bailiff — "Costs of Execution" — Possession Money—Several Warrants against same Debtor—Different Goods seized on same Premises under each Warrant—Same Man in Possession under all the Warrants—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *ss.* 146, 154 *—Treasury Order, February* 22, 1901, *r.* 35 — *Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 11.

When the high bailiff of a county court levies execution on the goods of a judgment debtor under several warrants, and seizes the same goods to satisfy the warrants, he is only entitled to charge one possession fee. But if he seizes and appropriates different goods to satisfy each warrant, he is entitled to possession money under each warrant, although all the goods seized under the several warrants are on the same premises and possession under all the warrants is held simultaneously by one person only.

THIS was an application to review the taxing master's decision under these circumstances.

On March 17, 1903, the high bailiff of the county court of Aberdare in Glamorganshire levied under two warrants of execution upon goods of the debtor on the same premises, one at the suit of judgment creditors for 24*l.* 4*s.* 6*d.*, and the other at the suit of judgment creditors for 11*l.* 3*s.* 8*d.* On March 19 the high bailiff, while still in possession under the two executions, levied a third execution for 24*l.* upon goods of the debtor on the same premises. In each case the high bailiff seized and appropriated different goods of the debtor, though on the same premises, to satisfy each warrant. Possession under all three executions was held by the same person and was retained until March 23, when a receiving order was made against the debtor, and the goods seized were thereupon handed over to the official receiver. The goods were subsequently sold by the official receiver and realized 219*l.*

The high bailiff carried in his costs for taxation in the bankruptcy under s. 11 of the Bankruptcy Act, 1890, and claimed to be entitled to poundage or possession money under each execution, notwithstanding that the possession under the

second and third warrants was held simultaneously with that under the first warrant and by the same person; and his total poundage in this respect amounted to 8*l.* 12*s.* 6*d.* The Board of Trade objected that, as possession under the first two warrants was held concurrently with possession under the third execution and by the same person, the high bailiff was only entitled to one maximum fee of 10*s.* per day. The taxing master overruled the objection and gave the following reasons: "The charges of the high bailiff for keeping possession under each of several warrants of execution have always been allowed, provided that there are sufficient goods on the premises to justify the succcessive warrants, and there is nothing in the County Court Acts or Rules which limits such charges in the manner suggested. The Treasury Order of February 22, 1901, r. 35, provides for 'keeping possession of goods till sale on any process of execution'; and this, in my opinion, refers to each successive warrant of execution as it comes into the high bailiff's hands. As to the words 'so that the total fee does not exceed 10*s.* per day,' I consider that they only apply to the total fee on each warrant."

The Board of Trade now moved to review the taxing master's decision.

Muir Mackenzie, for the Board of Trade. The question here is what "costs of execution" are to be allowed against the debtor's estate under s. 11 of the Bankruptcy Act, 1890. It is contended that under the county court scale of fees only one possession ought to be charged, and that up to the maximum of 10*s.* a day. (1) Under ss. 146 and 154 of the County Courts Act, 1888, a warrant of execution issued to the high bailiff is "in the nature of a writ of fi. fa.," and warrants are to be executed in the order in which they are delivered to the high bailiff, who has to put a fit person in

(1) The high bailiff's fees are regulated by the Treasury Order of February 22, 1901, Sched. B, and rule 35 gives him as a fee "for keeping possession of goods till sale on any process of execution, per day . . . not exceeding seven days, 6*d.* in the pound on the value of goods seized, to be fixed by appraisement in case of dispute, so that the total fee does not exceed 10*s.* per day. . . ."

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possession. If this had been a case of three writs of fi. fa., three sets of possession money could not have been charged: *In re Wells & Croft* (1); Archbold's Practice, 14th ed. p. 860; *Jones* v. *Atherton*. (2) The high bailiff is practically the sheriff of the county court, and it is submitted that the same rule should be followed that is applied to the case of several executions by the sheriff. There is no direct authority on the point, but the case of *In re Broster* (3) impliedly supports this view.

F. Mellor, for the high bailiff. It may be conceded that if the same contentions apply to the case of a high bailiff as are applicable to the case of a sheriff, then this charge of three possession fees cannot be maintained. But the law and scale of fees with regard to a high bailiff are based on entirely different principles to those applicable to a sheriff, and the authorities cited are not in point. This is an attempt to unsettle what has been the settled practice of taxing masters since the County Courts Act, 1856. Formerly, by the County Courts Act, 1846 (9 & 10 Vict. c. 95), s. 94, a writ of fi. fa. as a warrant of execution was issued to the high bailiff, and the scale of fees of the high bailiff was similar to that applicable to a sheriff, and was based on the amount of the demand; but by the County Courts Act, 1856 (19 & 20 Vict. c. 108), Sched. C, the scale of fees of a high bailiff was completely altered, and, instead of being based upon the amount of the warrant, is based solely upon the value of the goods seized, and the earlier fees for levy, for mileage, and other items were entirely swept away, and there is one comprehensive fee with a maximum limit. That practice has continued to the present day, with the verbal alterations introduced by the Treasury Order of 1901. Then the County Courts Act, 1888, s. 146, says that a warrant of execution in the nature of a fi. fa. shall be issued to the high bailiff. The difference in wording between s. 94 of the Act of 1846 and s. 146 of the Act of 1888, and the alteration in the scale of fees under the Act of 1856, shew that the remuneration of a high bailiff is based upon an entirely different principle to

(1) (1893) 10 Morr. 69. (2) (1816) 7 Taunt. 56; 17 R. R. 442.
(3) [1897] 2 Q. B. 429.

that of a sheriff. Under the present County Court Rules, Order XXV., r. 20, the high bailiff gets nothing at all unless he necessarily remains in possession for more than half an hour, and then he only gets his poundage on the value of the goods seized, whereas the sheriff gets a mileage charge and certain other items before he enters into possession of the goods at all. Here the high bailiff levied on different goods in respect of each warrant, and it is not unreasonable that he should be paid his poundage under each warrant in accordance with the settled practice.

Muir Mackenzie, in reply. The citations from the earlier Acts and Rules are immaterial, because the whole of the present legislation is new. The question is whether under the Treasury Order of 1901 three possession fees for one man in possession on the same premises are to be paid as "costs of execution" out of the debtor's estate.

[WRIGHT J. I should not feel much difficulty in adopting your view, if the goods seized under each execution were the same goods; but here different goods were seized under each execution.]

But all the goods were in the same place and only required one man to keep possession of them. No extra work was done in the way of keeping possession. Rule 35 prescribes a maximum of 10*s.* per day. It is most unreasonable that a bankrupt estate should be diminished by the costs of possession under three county court warrants where the total amount exceeds 20*l.*, whereas, if there had been but one warrant for 50*l.*, or even 20*l.*, only one possession fee at 10*s.* per day could have been charged.

WRIGHT J. This case raises, no doubt, a question of some importance. By s. 11 of the Bankruptcy Act, 1890, "costs of execution" are to be paid in a certain way. In this case the executions were in the county court, and by the County Courts Act, 1888, s. 146, it is provided that the registrar shall issue under the seal of the Court a warrant of execution in the nature of a writ of fieri facias to the high bailiff of the Court, who, by such warrant, shall be empowered to levy, or cause to

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Wright J.

be levied by distress and sale of the goods and chattels wheresoever they may be found within the district of the Court, such sum of money as shall be ordered to be paid. Therefore, on receiving a warrant of that kind, the high bailiff is told how much he is to raise by the levy under that warrant, and he would do wrong if he seized any more goods than would reasonably answer the amount he is required by the warrant to levy. Nothing turns on any other sections of the County Courts Act, but the question turns upon the Treasury Order of February 22, 1901, Sched. B, Part I., r. 35, which regulates the fees of a high bailiff. It says: "For keeping possession of goods till sale on any process of execution, per day . . . . not exceeding seven days, sixpence in the pound on the value of the goods seized . . . . so that the total fee does not exceed 10*s.* per day." Now what is the meaning of that as applied to the facts in this case? Here there were three executions at the same place, two of them on one day, and the third two days afterwards. If the same goods were seized on the three occasions, it seems to me that, quite apart from the analogy of the sheriff's law, it would be a reasonable construction of rule 35 to say, that when possession had once been taken of particular goods they would remain in the same possession subject to any subsequent executions put on the same goods, and that there would be only one possession fee payable. But I have to apply the language of that rule to a case where the high bailiff, receiving the first warrant, appropriates 30*l.* worth of goods to that warrant; on receiving the second warrant, appropriates a further 14*l.* worth of goods to the second warrant; and on receiving a third warrant, appropriates a further 27*l.* worth of goods to that warrant. Under those circumstances I do not think it would be right to apply rule 35 so as to make the possession of each set of goods all one possession, although the goods taken possession of in respect of each warrant are all together in one place and on the same premises. It seems to me that you cannot apply rule 35 in that way. A sum up to 10*s.* a day is payable for keeping possession of the goods seized under the first warrant. It seems to me that according to the plain language of the rule

another fee is payable for keeping possession of the different goods seized under the second warrant, and another fee is payable for keeping possession of the different goods seized under the third warrant. It is admitted the conclusion would be different if the ordinary law of fieri facias of sheriffs applied. I am not quite certain that that admission need be made, although I do not wish to question at all that that is the law: I am not sure it may not be open to argument even in the case of sheriffs, if the goods were quite different under the different seizures. But here I think the rule in question is used, not according to the common law of sheriffs, but simply according to the language adopted with reference to the county court procedure. It may be it would be right (and I do not say whether it would or would not) that the regulation in the Treasury Order should be altered. I should think very likely it ought to be; but of course I have nothing to do with that. I hold, therefore, that this appeal must be dismissed, and that what appears to have been the usual practice in county courts must continue to prevail until some other Court says otherwise.

Solicitors: *The Solicitor of the Board of Trade; E. F. Turner.*

H. L. F.

1903
Nov. 17.

HOBBS, PETITIONER *v.* MOREY, RESPONDENT.

Municipal Corporation—Election—Nomination and Election of Disqualified Person—Right of Opponent to claim Seat—Notice of Disqualification—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *s.* 56, *sub-s.* 2.

The petitioner and respondent were nominated in proper form for election to the office of councillor for a ward in a borough, and the respondent obtained the majority of votes and was declared elected. Both at the time of his nomination and of the election, however, he was disqualified by reason of his interest in a contract with the council. The petitioner claimed the seat on the ground that his being the only valid nomination he should be declared elected. The respondent admitted the disqualification:—

Held, that, the disqualification not being apparent on the face of the nomination paper, the nomination of the respondent was valid, and that as the petitioner did not allege any notice to the electorate of the disqualification of the respondent, the votes given for him could not be treated as having been thrown away, and the petitioner was not entitled to claim the seat.

CASE stated under s. 93, sub-s. 7, of the Municipal Corporations Act, 1882.

At an election held on June 19, 1903, to fill a casual vacancy in the office of councillor for the North Ward of the borough of Newport, in the county of the Isle of Wight, the respondent and the petitioner were respectively nominated as candidates for election to fill the said office.

The respondent obtained a majority of votes at the said election, and was declared by the returning officer at the said election to have been elected to fill the office of councillor for the North Ward of the said borough. The respondent was at the time of his nomination as a candidate for the said office, and at the time the said election was held, a partner in a firm which at the time of the nomination and at the time of the election was a party to a contract to supply goods to the council of the said borough.

The respondent at the time of his nomination and of the election was disqualified by s. 12, sub-s. 1 (*c*), of the Municipal

Corporations Act, 1882, for being elected and for being a councillor of the said borough by reason of his interest as a partner of the said firm in the said contract.

On June 11, 1903, after the respondent had been nominated as a candidate for the said office, and before any poll was taken at the said election, notice in writing was given by the petitioner to the mayor of the said borough objecting to the nomination of the respondent as a candidate for election to the said office on the ground of his said disqualification, and claiming that the petitioner should be declared elected as councillor for the said ward by reason of the respondent being so disqualified. Notice in writing of the objection and claim was also given by the petitioner to the respondent. The mayor held that he could not adjudicate on the objection so raised, and determined the nomination to be valid in form. After the close of the poll on June 19, 1903, and before the returning officer declared the result of the election, the petitioner gave the respondent a notice in writing objecting to the declaration of his election as a councillor on the ground of his being disqualified as aforesaid, and claiming to be declared himself elected to the office.

On July 8 the petitioner presented a petition against the election of the respondent, praying that it might be determined that the petitioner was duly elected to the office.

On July 25, 1903, the respondent gave the petitioner notice in writing that he did not intend to contest the allegation that he was at the time of his nomination and election disqualified by his interest in a contract with the council, but that he would contest the petitioner's right to claim the seat.

The questions for the opinion of the Court were:—

(1.) Was the election of the respondent to the office of councillor for the said ward invalid?

(2.) Is the petitioner to be deemed to be elected to the office of councillor for the said ward?

R. Cunningham Glen, for the petitioner. The respondent having admitted that he is disqualified under s. 12 from being elected or being a councillor, the only question before the Court

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is whether it can declare the petitioner elected. There were only two nominations, and as one of them was of a person who was admittedly disqualified, s. 56, sub-s. 2, of the Municipal Corporations Act, 1882, comes into effect. That section provides that if the number of valid nominations is the same as that of the vacancies the persons nominated shall be deemed to be elected. The nomination of the petitioner was the only valid nomination, and he must, therefore, be deemed to be elected. The Court has power to declare him elected by s. 93, sub-s. 4. If a candidate is disqualified from being elected he is also disqualified from being nominated, as was pointed out by Wright J. in *Harford* v. *Linskey*. (1)

Corrie Grant, for the respondent. The principle of election law is that when there has been an election the candidate who is declared to be elected must be shewn to have the majority of votes.

If, however, a candidate is disqualified by status, as in the case of a woman or a felon, the votes given for that candidate will be held to have been thrown away, and the opposing candidate, although in fact he has received a less number of votes, will be declared to be elected: *Beresford Hope* v. *Lady Sandhurst*. (2)

Again, if notice of a non-apparent disqualification of a candidate is given to the electorate, then the vote of any elector voting for that candidate will be held to have been given perversely and so thrown away, and in such a case the candidate with the minority of votes may be declared elected.

Here, however, no notice of the disqualification of the respondent was given to the electorate, and, therefore, the votes given to him cannot be regarded as having been thrown away. The nomination of a person who is actually disqualified is not an invalid nomination. This is clear from the Act itself, which provides that when there has been an election the only way in which the result can be questioned is by petition, and it gives as one of the grounds of such a petition (by s. 87 (*c*)) that the person whose election is questioned was at the time of the election disqualified: *Pritchard* v. *Mayor*,

(1) [1899] 1 Q. B. 852. (2) (1889) 23 Q. B. D. 79.

&c., of Bangor (1); *Drinkwater* v. *Deakin*. (2) The petitioner is entitled to have the election of the respondent declared void, but he cannot claim the seat unless he can shew that the constituency had notice of the disqualification, and that the votes given for the respondent were, therefore, votes thrown away.

Cunningham Glen replied.

KENNEDY J. In this case the question before us is as to the right of the petitioner in this municipal election petition to claim to be elected. There is no question before us now as to the disqualification of the respondent, who received the majority of votes at the election. He, as I understand, admits that he is disqualified, and that he is a person who could not, under s. 12 of the Act, be elected or be a councillor.

The claim of the petitioner, however, is that by reason of his opponent's disqualification he is entitled, there being only two candidates at the election, to be declared elected. It is said that the disqualification which prevents the respondent from being elected or being a councillor is also a disqualification which prevents him from being nominated, and the argument is that there being consequently only one valid nomination, s. 56, sub-s. 2, operates, and the person nominated (that is the petitioner) is to be deemed to be elected. That is, in other words, to say that the petitioner, who obtained the minority of votes at the election, is to be declared elected, and the majority of votes—those given for the respondent—are to be altogether disregarded.

I cannot assent to that view. It seems to me to be reasonably clear, both on the statute and on the authorities which have been referred to, that what was intended by the expression in s. 56, "valid nomination," was what Lord Watson said that that expression meant in *Pritchard* v. *Mayor, &c., of Bangor*. (1) The question there was as to the right of the mayor as returning officer at a municipal election, where he had to deal with an objection to a nomination paper, and Lord Watson said (3): "If no objection is made, or if objections are stated and repelled

(1) (1888) 13 App. Cas. 241. (2) (1874) L. R. 9 C. P. 626.
(3) 13 App. Cas. at p. 252.

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Kennedy J.

by the mayor, then the nomination becomes a valid nomination. I do not mean to suggest that it is final and conclusive upon questions of disqualification, or other similar objections which may be taken to it, but I think it was intended to be conclusive to this effect, that the nomination paper so sustained as valid should form the basis of the election, and that the nominee in that paper should be treated as a person for whom votes could be given before the returning officer." The expression "valid nomination," therefore, includes the case of a person who is disqualified in fact, but whose disqualification is not apparent on the nomination paper, and whose nomination has been sustained by the mayor. That being so, the election must proceed, and the question—as has been pointed out in some of the cases—becomes, not a question between the two candidates, but between the successful candidate and the electorate. The election of such an unqualified person can be objected to in only one way, namely, by election petition to the Court. The Court on the hearing of the petition cannot, I think, declare that a candidate who has a minority of votes is elected, unless it has first decided that the votes given to the candidate who is returned at the head of the poll are votes thrown away. I agree, however, that there are cases in which the Court has power so to decide. Alike in municipal and in parliamentary elections, if a person is a candidate who is manifestly disqualified, then in such a case the votes given for him may be treated as having been thrown away, since they were perversely and wilfully given to a candidate whom the electors knew to be disqualified. In regard to the nomination itself, as Wright J. says in *Harford* v. *Linskey* (1): "If the nomination paper is, on the face of it, a mere abuse of the right of nomination or an obvious unreality, as, for instance, if it purported to nominate a woman or a deceased sovereign, there can be no doubt that it ought to be rejected, and no petition could be maintained in respect of its rejection." If the election proceeds, then in such a case, for instance, as that of *Lady Sandhurst* (2), where the disqualification of the candidate was apparent—and the fact that she was a woman

(1) [1899] 1 Q. B. 852, at p. 862. (2) 23 Q. B. D. 79.

must have been known to every one who voted for her—the votes given for her might be treated as nullities. But where the disqualification does not appear on the nomination paper and the election proceeds, and the disqualification is not known to the electors, then, unless on a scrutiny a sufficient number of the votes given for the candidate who has the majority can be struck off to give the petitioner a majority, I think he cannot successfully claim the seat, and the votes given to his opponent cannot be disregarded. That seems to me to be the true view and in accordance with both authority and principle; and as here the disqualification was not apparent and the petition does not allege that the voters knew of the respondent's disqualification (the only notices being notices to the mayor and to the opposing candidate), and the petitioner had only a minority of votes, I do not think that he can successfully claim the seat. All that we can do, therefore, on this petition is to declare the election of the respondent void.

DARLING J. I am of the same opinion. It seems to me that the question is really concluded by the judgment of Lord Watson in the case of *Pritchard* v. *Mayor, &c., of Bangor*. (1) We therefore answer the first question of this petition in the affirmative, and the second in the negative.

Judgment accordingly.

Solicitors for petitioner: *Sole, Turner & Knight.*

Solicitors for respondent: *Ley, Lake & Co., for R. R. Pittis, Newport, Isle of Wight.*

(1) 13 App. Cas. 241.

A. P. P. K.

1903
Nov. 16.

PEARCE, APPELLANT; MERRIMAN, RESPONDENT.

Parliament—Franchise—Qualification—Occupier—Husband and Wife living together—Wife, Owner—Husband, Tenant—Representation of the People Act, 1867 (30 & 31 *Vict. c.* 102), *s.* 3.

A husband living with his wife in a house of which the wife is the owner and of which the husband is tenant under an agreement of tenancy with the wife is entitled to be registered as a voter under s. 3 of the Representation of the People Act, 1867.

CASE stated by the revising barrister for the Westbury Division of the county of Wilts, before whom objection was duly made to the name of William Pearce being retained on Division I. of the occupiers' list of Trowbridge, South, in respect of a dwelling-house, No. 25, West Street. The facts were as follows: Elizabeth Richman was tenant for life under the will of her husband of several houses, in one of which she resided, another being that in respect of which William Pearce, the appellant, claimed to have his name on the occupier's list. The appellant married a daughter of Elizabeth Richman, and he rented No. 25, West Street of his mother-in-law, and he and his wife resided there. The rent was 15*s.* 10*d.*, payable every four weeks, and for many years up to the death of Elizabeth Richman this rent was paid to her by the appellant, who also paid the rates, and was inserted by the overseers on Division I. of the occupiers' list and was entitled to vote and voted at elections. Upon the death of Elizabeth Richman in November, 1901, the house became the freehold property of the appellant's wife under the terms of her father's will. The appellant attended the revision court, and stated that upon the death of his mother-in-law he considered the question of his right to vote, and to secure that right he agreed with his wife to pay to her the same amount of rent that he had previously paid for the house. He produced a rent-book shewing the first payment of 15*s.* 10*d.*, due December 28, 1901, and a receipt for the same signed by his wife. The book shewed similar payments every four weeks

up to September, 1903. Between these dates the appellant and his wife resided in the house as they had formerly done, he continued to pay the rates, and his name was placed by the overseers on Division I. of the list of occupiers. The notice of objection given to the appellant stated the grounds to be—(1.) "that you have not occupied the qualifying premises as owner or tenant for twelve months immediately preceding July 15 in this year"; (2.) "that your wife being owner of qualifying premises disqualifies you." In support of this objection it was urged that the appellant was not the occupier of the house either as owner or tenant, and the case of *Hall* v. *Michelmore* (1) was cited in support of this view. On the appellant's behalf it was urged that that case did not govern the present one, as in the former there was no evidence of tenancy, whereas in the present case there was evidence of a bonâ fide tenancy, and that the mere transfer of his tenancy from his mother-in-law to his wife did not affect his right to be retained on Division I. It was also argued that under the Married Women's Property Act, 1882, a married woman, in respect of property acquired after January 1, 1883, is entitled to all the rights of and is in the same position as a feme sole, and is therefore in a position to give her husband notice to quit a tenancy of her property or to obtain possession of her property by means of an ejectment order against her husband, or an action. The revising barrister was of opinion that the fact that the appellant was the occupier of the premises when his wife became the owner of them was immaterial. The same question would have arisen if on the house becoming the property of his wife he had moved into it from another house and had claimed as occupier in succession from one to the other. He was further of opinion that, though a wife might let to her husband any of her property of which she gave up the occupation to him, the joint occupation by husband and wife of a house belonging to her was inconsistent with the relation of landlord and tenant. The right of a landlord to give notice to quit to, or to eject, a tenant could not, in his opinion, exist in opposition to the marital right

(1) (1901) 86 L. T. 17.

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of the husband to continue to reside with his wife. He therefore came to the conclusion that the agreement that the husband should be tenant of the house to his wife was, under the circumstances, inoperative to constitute him an occupier as tenant. The revising barrister, therefore, held that the objection was valid, and struck out the appellant's name from the list.

Lewis Thomas, for the appellant. The appellant was entitled to be registered as a voter in respect of this dwelling-house which he occupied as tenant to his wife. The fact that there was evidence of a bonâ fide agreement of tenancy between husband and wife distinguishes this case from *Hall* v. *Michelmore* (1), which was relied on by the respondent before the revising barrister. In that case it was found as a fact that no agreement of tenancy had been entered into, and it was argued that, because the husband and wife lived together in the wife's house, the husband paying the rates, there was an implied tenancy sufficient to give a qualification; but the Court held that in the absence of an agreement of tenancy the husband was not qualified. Since the passing of the Married Women's Property Act, 1882, there is nothing to prevent a wife from being her husband's landlord, and in that capacity she would possess all the same powers as any other landlord. This is not a case of joint occupation, because joint occupation involves a joint tenancy.

The respondent did not appear.

LORD ALVERSTONE C.J. This appeal seems to me to afford a practical instance of the hypothetical case which was referred to in *Hall* v. *Michelmore*. (1) It was contended there that the mere fact that the house, in which the husband and wife lived, was owned by the wife gave the husband the right to vote as an occupier. The revising barrister held that that was not sufficient, and the Divisional Court came to the conclusion that, as there was no evidence of any agreement of tenancy under which the husband occupied the premises as tenant of his wife, the decision appealed from was right. But in the present case

(1) 86 L. T. 17.

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Lord Alverstone C.J.

the facts are entirely different. It appears that the question of the appellant's right to a vote had been considered by him, and in order to secure that right he agreed to become the tenant of his wife, and the rent-book shewed periodical payments of rent by him to her. It must, therefore, be taken that there was a bonâ fide agreement for a tenancy which, if it had been an agreement by the husband with any one but his wife, would clearly have entitled him to be on the register. The revising barrister, however, was of opinion that the fact that the agreement was between husband and wife prevented him from giving effect to it. I do not agree with that view. Assuming a bonâ fide agreement under which a husband is tenant to his wife, I do not think that there is anything in the relation of husband and wife to prevent it from being operative so as to entitle the husband to a vote. This appeal must, therefore, be allowed.

KENNEDY J. I agree. I think that the question is one of fact, namely, whether there was a real agreement of tenancy. If there were a real tenancy, the husband is entitled to vote irrespective of the fact that his own wife is his landlord. Since the Married Women's Property Act, 1882, there is nothing to prevent a wife from standing in the position of landlord to her husband.

DARLING J. I am of the same opinion. We are not deciding anything inconsistent with what was said in *Hall* v. *Michelmore*. (1) In that case there was no evidence that the husband was tenant to his wife, and all that was decided was that where a husband and wife are living together there is no presumption that one is the tenant of the other. In the present case, on the other hand, there was evidence of a tenancy which the revising barrister accepted; but where I think he fell into an error was in thinking that there was a joint occupation by the husband and wife which was inconsistent with the relationship of landlord and tenant. I do not think this was a case of joint occupation, for that would only

(1) 86 L. T. 17.

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arise when both parties were tenants. Here the wife was the landlord and the husband the tenant. The husband had the right to occupy the premises in his capacity of tenant; the wife had the right to live there also, not under the tenancy agreement, but under a different contract altogether, namely, that of marriage.

Appeal allowed.

Solicitors for appellant: *Milner & Bickford, for Wills & White, Trowbridge.*

F. O. R.

1903
Nov. 16.

DOVER, APPELLANT; PROSSER, RESPONDENT.

Parliament—Franchise—Qualification—Inhabitant Occupier—Schoolmaster—Permission to occupy House—Representation of the People Act, 1884 (48 & 49 *Vict. c.* 3), *ss.* 2, 3.

A schoolmaster was permitted, but not required, by his employers to live in a certain house so long as he continued to hold the appointment of schoolmaster:—

Held, that the schoolmaster did not occupy the house by virtue of his employment, and, therefore, was entitled to have his name inserted in Division I. of the list of voters.

CASE stated by the revising barrister for the Medway Division of Kent. The facts as shewn by the case were as follows: The appellant duly claimed to have his name inserted in Division I. of the list of voters as a full inhabitant occupier, and not only as a person entitled under the service franchise as a parliamentary elector. The name of the appellant appeared, duly qualified and registered as a parliamentary elector, in the said list in Division II. One John Archard, by Arthur Joseph Ellis, solicitor, his agent, duly objected to the said claim, and maintained that the appellant was only entitled to have his name placed in the said Division II. After hearing evidence in support of and in opposition to the said claim, the revising barrister disallowed same and found as facts—(1.) that the house occupied by the appellant was occupied by him in virtue of his service as a schoolmaster

and not otherwise; (2.) that no deduction from his salary was made in consequence of his residing in the said house; and (3.) that, if a new schoolmaster were to be appointed in the stead of the appellant, he would presumably be entitled to reside in the house then occupied by the appellant, and that the latter would be required to vacate the said house. The revising barrister accordingly directed that the said claim should be struck out and that the appellant's name should be retained, as before, only on Division II. of the list, on the ground that on the evidence the appellant's claim to be registered as a full inhabitant occupier, entitled both to the parliamentary and to the county franchise, was bad in law.

H. Lynn (*T. A. Organ* with him), for the appellant. The decision of the revising barrister was wrong. The appellant was permitted by his employers to occupy this house, but was not required to do so, nor was it necessary for the discharge of his duties that he should do so. The authorities shew that, in these circumstances, the appellant is entitled to the full franchise, and not merely to the service franchise: *Marsh* v. *Estcourt* (1); *Hughes* v. *Overseers of Chatham* (2); *Smith* v. *Overseers of Seghill.* (3) The essential difference between the case of a man being required to live in a particular place for the purpose of discharging his duties and a mere permission to do so is shewn in the *Petersfield Case.* (4) [He also referred to *McClean* v. *Pritchard.* (5)]

The respondent did not appear.

LORD ALVERSTONE C.J. I am of opinion that this appeal must be allowed. The governing test in cases of this sort is whether or not the occupier of the premises, in respect of which the claim is made, is required to occupy them, either by the express terms of his employment or by the nature of his duties. If he is merely permitted, but not obliged, to occupy the premises so long as he performs certain duties, that

(1) (1889) 24 Q. B. D. 147.
(2) (1843) 5 M. & G. 54.
(3) (1875) L. R. 10 Q. B. 422.
(4) (1874) 2 O'M. & H. 94, at p. 98.
(5) (1887) 20 Q. B. D. 285.

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is not an occupation by virtue of any office, service, or employment, and is not sufficient to disentitle him from having his name registered in Division I. This view is supported by the judgment of Wills J. in *Marsh* v. *Estcourt* (1), where he said: "In the case referred to by the learned counsel for the respondent, the occupation was admitted to be occupation by virtue of service. Here the labourers were not required to reside in the cottages, but were allowed to reside in them as a privilege. It would be an abuse of language to call residence under such conditions occupation by virtue of service." If it necessarily follows from the nature of the duties which a man has to discharge that he must occupy a certain house in order properly to discharge those duties, that would be a case of a man occupying certain premises by virtue of his employment just as much as if he were expressly required to do so. An example of this class is to be found in the *Petersfield Case* (2), where Mellor J., in dealing with a case of an occupation necessary for the discharge of the occupier's duties, instanced the case of a gamekeeper who received so much wages and also occupied a house in the centre of his employer's preserves; in that case the gamekeeper did not live in the house as a tenant, but because the nature of his employment required him to. Those examples shew the two classes of cases, and the question which we have to decide is, under which category does the present case come? The revising barrister has not expressly found that the appellant was not obliged to reside in the house in question, but I think he meant to imply that the appellant was not so obliged, and that he might if he liked reside elsewhere, because it is stated in the case that if a new schoolmaster were appointed in the place of the appellant, he would presumably be entitled to reside in the house hitherto occupied by the appellant. That shews, I think, that the revising barrister meant to find that the appellant was not required to reside in this house, and that the nature of his duties did not necessitate his residing there.

The case, therefore, comes within the authorities which shew that the appellant did not occupy this house by virtue of

(1) 24 Q. B. D. 147, at p. 151. (2) 2 O'M. & H. 94, at p. 98.

his employment, and he is therefore entitled to have his name inserted in Division I. of the list of voters. 1903 DOVER v. PROSSER.

KENNEDY and DARLING JJ. concurred.

Appeal allowed.

Solicitors for appellant: *Baker & Nairne.*

F. O. R.

CROUAN *v.* STANIER. 1903 *July* 31.

Insurance (Marine)—Suing and Labouring Clause—Salvage—Claim of Underwriters to Salvage Award.

By a policy of insurance a vessel was insured against "total or constructive total loss only." The policy contained the usual suing and labouring clause. The vessel having struck on a reef her owner abandoned her, and the underwriters incurred expense in floating her off and bringing her to land. In an action on the policy in which the owner claimed as for a total loss, and the underwriters counter-claimed for the expenses to which they had been put in salving the vessel, the jury found that the vessel was not a total loss, and that the underwriters were not liable on the policy:—

Held, that the underwriters were not entitled to recover the expenses of salving the vessel, either at common law, since those expenses were within the suing and labouring clause in the policy, or as a salvage award, since the underwriters were parties interested in the vessel.

FURTHER CONSIDERATION before Kennedy J. in the Commercial Court.

The action was brought by the plaintiff, who was for the purpose of this action to be deemed the owner of a ship called the *Isidoro Antunes*, against the defendant, who was an underwriter at Lloyd's, to recover as for a constructive total loss of the vessel.

The vessel was insured for twelve months from September 20, 1900, whilst in the rivers and basin of the Amazon, against the risk of total and constructive total loss only. The policy contained the usual suing and labouring clause.

On May 18, 1901, the *Isidoro Antunes* ran ashore upon a reef in the Amazon. She was submerged for the greater part

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of her length, and lay about half a mile from the shore. A few of the crew remained on board till May 23, when the owners sent a tug for them, and the vessel was then left without any protection. Between May 23 and June 8 she was plundered by natives, who carried off everything portable. The owners refused to take any steps to salve; and the underwriters, who were not liable under the policies for salvage as distinguished from suing and labouring charges, on June 20, 1901, made a contract with Messrs. Faria Barbosa to deliver the vessel in Para for 2750*l.*, "no cure no pay." On September 16, 1901, the vessel was floated and arrived at Para. The owners, who had given notice of abandonment, refused to take possession, and the present action was brought by the plaintiff. The defendant counter-claimed in respect of his expenditure on the salvage contract, and claimed that the money had been spent in saving and preserving the plaintiff's property, and that he was therefore entitled to be recompensed either (*a*) at common law as for money spent for the assured under an implied promise to repay it, or (*b*) by salvage award under the maritime law. At the trial, which took place before Kennedy J. and a special jury, the jury found in answer to questions that the owners might by taking reasonable precautions have prevented the damage to the vessel to the full amount, and that no opportunity was given to the underwriters or their agents to take precautions to prevent the damage.

The counter-claim of the defendant was then argued.

J. A. Hamilton, K.C., and *Maurice Hill*, for the defendant. The defendant is entitled at common law to be repaid the cost to which he has been put in saving a vessel which was the plaintiff's property. The policy of insurance was against total or constructive loss "only," and the effect of the word "only" is to strike out the suing and labouring clause. Under the circumstances, therefore, a promise must be inferred to pay for services rendered to the plaintiff's ship.

Alternatively, the defendant has rendered genuine salvage services for which he is entitled to a salvage award: *The*

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Pickwick (1); *The Solway Prince* (2); *The Liffey* (3); *The Purissima Concepcion.* (4)

It is a general salvage claim, and is within the policy of salvage cases, and is covered by the principle laid down by *The Pickwick.* (1)

Scrutton, K.C., and *Loehnis*, for the plaintiff. The defendant cannot succeed at common law, for the services which he has rendered are covered by the suing and labouring clause, and if the plaintiff had himself performed them he would have been entitled to recover the expense from the defendant under the policy: *Western Insurance Co.* v. *Poole.* (5) As to the claim for a salvage award, the defendant cannot raise it on account of his interest in the vessel. *The Pickwick* (1) really admits this, and is distinguishable on the facts.

[They referred to *The Blairmore* (6); *Uzielli* v. *Boston Marine Insurance Co.* (7)]

J. A. Hamilton, K.C., replied.

KENNEDY J. If I thought I should get further assistance I would take time to consider my judgment, but I do not think that this would be the case.

This is a counter-claim in respect of services rendered to the insured vessel, and the person who puts forward the claim is an underwriter on that vessel. The policy is a policy against total or constructive total loss "only," and contains the usual suing and labouring clause, which is not struck out. Under the policy it appears to me that the word "only," to which Mr. Hamilton has called attention, does not operate to strike out the suing and labouring clause; in other words, it is a policy under which if, as a fact, efforts are successfully made to avert either a total or a constructive total loss by the labours of the assured, there would be a right to recover for those labours under the suing and labouring clause. I think *Western Insurance Co.* v. *Poole* (5), which has been referred to, supports that view. In that particular case there was a clause expressly

(1) (1852) 16 Jur. 669.
(2) [1896] P. 120.
(3) (1887) 58 L. T. 351.
(4) (1849) 3 Wm. Rob. 181.
(5) (1902) 8 Com. Cas. 108.
(6) [1898] A. C. 593.
(7) (1884) 15 Q. B. D. 11.

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excluding salvage services. Here there is no such clause: the suing and labouring clause stands; and I do not see why it should not stand, with a statement that the underwriters, so far as regards the character of the loss, are only liable for actual total loss or constructive total loss.

That being the position of things when this vessel stranded on a reef in the Amazon, the owners, who claimed to be interested as assured, protected the vessel for a few days and then took the crew away, and said that they treated the casualty as a loss, and that the underwriters were the proper persons to deal with it, because it was a total loss. The underwriters then made a contract for employing a firm at Para, Faria Barbosa, to do the salvage work—that is, the work of getting the vessel off the reef and taking her to Para—on the principle of no cure no pay, and for a fixed reward in case it was successfully done. It was successfully done, and the agreed sum has been paid, and, either to the full amount of the expenditure, or to the extent of obtaining some money which will go in part reduction of it, the underwriters, who have successfully resisted an action brought by the plaintiff to recover as for constructive total loss, say, by way of counterclaim, "Treat us either as salvors, or as entitled to recover as under a common law count for work and labour done."

Now, to take the second point first, it appears to me to be impossible, on the construction that I give to this policy, to hold that there is any common law right. What the underwriters did they had a right to do for themselves under the policy, without prejudice to their contention that there was no constructive total loss; they, as well as the assured, had the right to do work and try to preserve the property. The assured refused to take any further step in the matter; the underwriters then did what the assured might have done himself, and the cost of which, if he had done it, he would have been entitled to recover from the underwriters; therefore, the underwriters are, in substance, under their claim for work and labour done for the assured, asking me to give them money which might be recovered back from them by the assured under the suing and labouring clause of the policy. I ought not, I think,

to treat the cost of the work and labour of preserving the vessel as the cost of work and labour done for the assured on any implied contract for payment by him, because if it were so done for him, and at his request, he would have a right under the policy to ask repayment from the underwriters of any sum that was given by such a judgment.

Now I come to what to me is much more difficult—namely, the question of a claim for maritime salvage. It is said that the underwriters paid Faria Barbosa, with whom they had contracted under an agreement of "no cure no pay," and that this agreement is strictly a salvage class of agreement; further, that they have salved that vessel which, by the verdict of the jury, was after all the assured's vessel, and not theirs. They claim to be entitled to an award as salvors. As far as I know, such a claim by underwriters, unless the case of *The Pickwick* (1) raised the point, is practically a novel one; and if such a claim were legally maintainable, this would seem to be an extraordinary thing, considering the number of vessels that must have been salved by underwriters within this last century. In this particular case I should feel great difficulty, if there were any right to salvage, in assessing, on the evidence before me, the amount due, because the salvage would have to be awarded on the value of the property as salved, and what, as salved, this vessel was worth for the purpose of a salvage valuation I should feel great difficulty in saying. But I am not deciding the case on that ground. If the right to salvage exists, I could come to some computation of value, but it would only be very small. I do not, however, feel justified in treating the underwriters who took on themselves the suing and labouring as doing the business otherwise than as persons who were acting in their own interest; it was to their own interest that there should be no constructive total loss, and they were, as I have already said, entitled under the policy so to act without affecting the safety of their position in refusing to recognise the casualty as a constructive total loss. On two grounds I feel an insuperable difficulty in awarding salvage to them for what they did by Barbosa's agency. In the first

(1) 16 Jur. 669.

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place, I think they were not volunteers; but they were, as insurers, apart from the special facts and circumstances, interested persons, salving for themselves to prevent a constructive total loss. I think further, on the particular facts, they were doing with the owner's knowledge that which he could safely and without risk to his own purse allow them to do, because as to suing and labouring he had a right to indemnity under the policy, and they ought, in my view, to be taken to have been acting as regards the assured on this basis.

But then comes the decision of Dr. Lushington in *The Pickwick*. (1) There a barque named the *Pickwick*, which was partly insured by certain underwriters, had been abandoned by her crew off the Isle of Man; the underwriters chartered a steamer to go in search of her, and ultimately that steamer did render salvage service to the barque and brought her into safety. A claim was put forward apparently by the underwriters (for the owners do not appear to have been parties to that case at all), and the question arose whether the party who hired the salving vessel was not entitled to claim as owner for the time being. There is a considerable discussion by the learned judge as to the position of the claim. He says: "If the owners of the property had hired the vessel at their own peril to save the ship, then I might have doubted whether I could have allowed them to appear in the character of salvors; still, I should have had great hesitation in excluding the persons who actually performed the service. But it is not pretended that the parties who now claim are owners at all. It is said that they are the insurers to the extent of 1170*l.*, and that, as brokers, insurances are effected by them to the extent of 12,000*l.* If this be so, on what grounds would they be entitled to sue?" Then he refers to the position of the insurers as persons who remained on shore and merely hired the vessel to do the work; and he points out the persons who remain on shore may still, if their property is at risk, be entitled to be salvors, though they remain on shore and do not take part personally in the act of salving. Then he proceeds: "The true question, however, is whether the party

(1) 16 Jur. 669.

who hired is not entitled to claim as the owner of the property for the time being. Am I to exclude the persons to whom the owners have transferred their right, by virtue of what they must have deemed a remunerative contract for the risk run and the services performed? I shall decree to them what I should decree to the owners of the *President* if they were suing here, namely, the proportion they would take for the performance of a beneficial service." And a little later on, after discussing the facts further, he says: "With regard to the steamer, I will only observe, that, with respect to Potter & Co. and Rawson & Co., I do not allot one sixpence to them in their capacity as salvors."

That great judge was acting, it seems to me, simply upon the view that for the time being the underwriters, under their contract for the employment of the *President*, ought to be treated as owners of the instrument of the salvage service which was at risk, and he allowed them as such to have a salvage award. It appears to me that in this case the circumstances are not the same. Were they the same I should feel myself simply bound to follow that decision. But here there was no contract for the hire or use of a ship at all. The only contract was for the services of Messrs. Faria Barbosa. Under that contract it may be that Faria Barbosa were under obligation not to claim salvage themselves, in the sense of claiming it by exercising a lien or suing for salvage in respect of the vessel salved. Be that as it may, it seems to me that this case is distinguishable. Just as a shipowner is entitled to reward for the use of his vessel and crew employed in a salvage, the judge there gave the underwriters, who, apart from their temporary ownership of the salving vessel, were not salvors, the reward which the owners of the chartered vessel would have been entitled to as owners, according to the practice of the Admiralty Court, but which, as I understand the facts, under the charterparty they must have surrendered to the underwriters. Here there is nothing of the kind; there were certain successful services rendered by persons engaged under a contract made with them by the insurers, who were not only interested in the safety of the property as insurers, and therefore

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were not pure volunteers, but who were (as indeed the common law counter-claim of the defendants assumes they were) doing that which under the circumstances was successful in preventing constructive total loss, with the knowledge and consent and in a sense on behalf of the assured person—in other words, suing and labouring for him, he knowing that under the policy he was entitled to treat the thing done, either directly or indirectly, as done at the expense of the underwriters.

I must disallow the claim. There will be judgment for the defendant on the claim with costs, and for the plaintiff on the counter-claim with costs.

Judgment accordingly.

Solicitors for plaintiff: *Thomas Cooper & Co.*

Solicitors for defendant: *Waltons, Johnson, Bubb & Whatton.*

A. P. P. K.

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Oct. 30; *Nov.* 6, 9.

[IN THE COURT OF APPEAL.]

In re H. B.

Bankruptcy—Procedure—Judgment Debt—Agreement to pay Judgment Debt by Instalments—Arrears of Instalments—Act of Bankruptcy—Bankruptcy Notice for Overdue Instalments—Notice to pay "in accordance with the Terms of the Judgment"—Validity of Notice—Garnishee Order Nisi—Stay of Execution under Judgment—Bankruptcy Act, 1883 (46 & 47 *Vict.* c. 52), s. 4, *sub-s.* 1 (*g*).

Sect. 4, sub-s. 1, of the Bankruptcy Act, 1883, specifying acts of bankruptcy, must be strictly interpreted. Therefore, a bankruptcy notice which requires payment of a judgment debt "in accordance with the terms of the judgment" is not a good notice within sub-s. 1 (*g*) if founded, not on the judgment according to its terms, but on the judgment as modified by some collateral agreement.

A creditor and his debtor agreed in writing that the debt should stand at a certain sum and that the debtor should consent to a judgment against him for that sum, but that the amount should be payable by instalments. Judgment was accordingly signed for the whole sum, but without any reference to payment by instalments. The debtor failing to pay some of the instalments as they fell due, the creditor served him with a bankruptcy notice requiring payment, not of the whole judgment debt, the final instalment of which had not yet become due, but of the total amount of the instalments then in arrear, as being "the amount due on the judgment":—

Held, that the notice was bad in that it did not require payment of the

debt "in accordance with the terms of the judgment" within the above sub-section.

Per Vaughan Williams L.J.: A bankruptcy notice issued for a smaller sum than the judgment debt by reason of credit being given for amounts already paid is a notice to pay "in accordance with the terms of the judgment."

Per Stirling L.J.: Non-compliance with a judgment is not an act of bankruptcy so long as the terms of the judgment are controlled by an outside agreement between the judgment debtor and creditor.

In re Feast, (1887) 4 Morr. 37, distinguished.

Per Curiam and Romer L.J. (see at p. 97 below): A garnishee order nisi obtained by a judgment creditor attaching all debts due to the judgment debtor to answer the judgment does not operate as a stay of execution on the judgment so as to preclude the creditor from issuing a bankruptcy notice under s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883.

THIS was an appeal by a judgment creditor against an order made by the registrar setting aside a bankruptcy notice which the creditor had served on the judgment debtor under s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883.

The creditor having been in litigation with the debtor in several actions, an agreement was entered into between them on April 18, 1903, by which it was provided that the actions should be put an end to and settled upon certain terms, one of which was that the debtor should, on or before the execution of the agreement, pay to the creditor the sum of 300*l.* in cash, and should consent to judgment against him for 2700*l.*, payable by instalments, the first of 700*l.* and the others of 500*l.* each, payable respectively at one, two, three, four, and five months from March 27, 1903. On the same day an order by consent was made in the actions by the master in chambers that, the debtor having paid to the creditor the sum of 300*l.*, the creditor was to be at liberty to sign judgment against the debtor in the actions for 2700*l.* Judgment was signed accordingly on April 20, 1903, for 2700*l.*

The debtor paid 350*l.* on account of the first instalment of 700*l.*, but he did not pay the balance, nor did he pay the two instalments of 500*l.* which became due respectively on May 27 and June 27, 1903. On May 20, 1903, the creditor obtained a garnishee order nisi that all debts owing or accruing due to the debtor from his bankers should be attached to answer the

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judgment for 2700*l.* From an inspection of the bankers' books the creditor found that a sum of 82*l.* 8*s.* 10*d.* was standing to the credit of the debtor. The debtor alleged that this sum did not belong to him in his own right, but was due to him as liquidator of a company.

On June 19, 1903, an order was made for the trial of an issue to determine whether the 82*l.* 8*s.* 10*d.* was the property of the debtor or of the company.

A bankruptcy notice issued for the whole amount of the judgment debt was set aside by the registrar on the ground that the debt was not in fact due. Subsequently, on July 13, 1903, the creditor issued a bankruptcy notice for the sum of 1267*l.* 11*s.* 2*d.*, as "the amount due on the final judgment" of April 20. That sum was the amount remaining unpaid of the three overdue instalments, after deducting the sum of 82*l.* 8*s.* 10*d.* which had been garnished. The registrar, on August 11, 1903, set aside the notice on the ground that the creditor, having issued a garnishee order, the proceedings on which were still pending, was not entitled to issue a bankruptcy notice. The creditor appealed.

By s. 4, sub-s. 1, of the Bankruptcy Act, 1883, it is provided that "A debtor commits an act of bankruptcy in each of the following cases" (inter alia): "(*g*) If a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him . . . . a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not, within seven days after service of the notice . . . . either comply with the requirements of the notice, or satisfy the Court that he has a counter-claim set-off or cross demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained."

Muir Mackenzie and *J. S. Green*, for the creditor. The question is whether execution upon the judgment had been

stayed within the meaning of sub-s. 1 (*g*) of s. 4 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52). No doubt, in order that the creditor may issue a bankruptcy notice, he must be in a position to issue execution on his judgment, and it is contended that the creditor was in that position here, for the garnishee order nisi cannot have the effect of staying execution.

[ROMER L.J. How can a garnishee order nisi prevent the creditor from issuing execution on the judgment? It is not either payment of the debt or an execution.]

[They were stopped by the Court.]

Herbert Reed, K.C., and *J. R. Atkin*, for the debtor. The effect of the garnishee order was to bind in the hands of the garnishees the debts due from them to the judgment debtor. If an execution had been levied upon the judgment, and a third party had then claimed the goods which had been seized, no property of the judgment debtor would have been transferred to the creditor, and there would not have been payment of the debt; and yet in such a case it has been held that the creditor could not issue a bankruptcy notice. A judgment creditor cannot seize a debt due to his judgment debtor, thus depriving him of the means of paying the debt, and at the same time serve him with a bankruptcy notice. After the deduction of the 82*l.* 8*s.* 10*d.*, the debtor could not pay or compound for the judgment debt. The creditor cannot claim payment of the debt for which he holds security. When a creditor has elected to make use of another remedy, he cannot commence bankruptcy proceedings against the debtor: *In re Child* (1); *Ex parte Raymond.* (2) When a creditor has taken proceedings to attach debts due to the debtor, he cannot be heard to say that those debts were not the property of the debtor. The incidents of an execution apply to this mode of enforcing payment of the debt by means of attachment. While the garnishee issue is pending, the creditor cannot levy execution for the debt: *Ex parte Ford.* (3)

[ROMER L.J. In that case the judgment creditor had levied execution on goods which were sufficient to pay the

(1) (1892) 9 Morr. 103. (2) (1892) 9 Morr. 108, n.
(3) (1886) 18 Q. B. D. 369.

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whole debt. Here the judgment creditor only has something in the nature of a security.]

It is submitted that, if by any process of law the creditor has attached property of the debtor, he cannot, while that proceeding is pending, attach the debtor in another way. For instance, if the creditor had got a receiver of all the debtor's property appointed, he could not issue a bankruptcy notice against the debtor. It does not signify that there is not technically an execution; it is sufficient that the creditor is enforcing his debt against the property of the debtor. Here the creditor has in substance issued execution against the debtor. The order nisi attaches all debts due from the bank to the debtor, not merely the 82*l.* 8*s.* 10*d.*

Again, it is submitted that the bankruptcy notice is bad in form. The creditor has not demanded payment of what remains due under the judgment. The judgment was simply for 2700*l.*, and the creditor has only demanded payment of the overdue instalments under the collateral agreement. That agreement cannot be enforced as part of the judgment.

[ROMER L.J. Is it not the proper inference that, if the debtor does not pay the instalments as provided by the agreement, the judgment is to be enforced in the ordinary way?]

That is not what the creditor is doing. There is one entire judgment debt, and there can only be one execution for the whole. The creditor is, in effect, issuing execution for a part only. He cannot by a bankruptcy notice demand payment of part of the judgment debt. The Legislature has created an act of bankruptcy, and the words of the statute must be strictly followed. Here, the notice is given in respect of part only of the judgment debt; it is clear that the creditor does not intend to abandon the future instalments amounting to 1000*l.*

Muir Mackenzie, in reply. When there is a judgment and an agreement that it is not to be enforced so long as certain instalments are duly paid, there is, in effect, a stay of execution as regards the instalments which have not become due, and a bankruptcy notice can be issued for the amount which is due

under the terms of the agreement. The amount is due under the judgment, but the agreement has postponed the payment of part of it. A creditor could not issue execution for what had been already paid to him. So here, the creditor could not indorse on his writ a direction to the sheriff to levy for more than was due to him. The amount of the overdue instalments was due upon the judgment.

[STIRLING L.J. The Act in effect says that you must look at the "judgment"; you wish to import another document.]

Suppose a judgment for 2000*l.*, and an agreement by the creditor not to issue execution for more than 1000*l.*; 1000*l.*, and not more, would then be due upon the judgment, and it is submitted that a bankruptcy notice could be issued for the 1000*l.* If the creditor had issued a bankruptcy notice for the whole judgment debt, it would have been said that he was claiming too much because of the agreement. It may be that the creditor could not afterwards issue a second bankruptcy notice for the rest of the debt, but that does not make the notice which he has issued bad. It is submitted that the amount is due upon the judgment, and that execution for it has not been stayed. Why should not the creditor be at liberty to say that he is in honour bound not to demand more?

[ROMER L.J. Could he say that on the face of the notice?]

It might be wrong in form to do that, but he might demand the part only and tell the debtor by letter that he did not wish to ask for more then.

The authorities shew that in a case of this kind execution for the whole amount of the judgment debt would be wrong: execution can only issue for the instalments in arrear, and the agreement stays execution for the instalments not yet due: *Tilby* v. *Best* (1); *Barber* v. *Barber* (2); *Cuthbert* v. *Dobbin* (3); *In re Follows*. (4) The amount for which you issue execution is for the sum actually due, having regard to the agreement for payment by instalments: *In re Feast* (5); so that what is

(1) (1812) 16 East, 163.
(2) (1811) 3 Taunt. 465.
(3) (1845) 1 C. B. 278.
(4) [1895] 2 Q. B. 521.
(5) 4 Morr. 37.

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due under or "in accordance with the judgment" is what is so due having regard to the agreement. This bankruptcy notice could not possibly mislead the debtor: it only asked him to pay the sum that was actually due and for which execution could issue. The Court ought not to extend *In re Child* (1) by holding that a bankruptcy notice is bad for asking too little.

With regard to the effect of the garnishee order, it is submitted that the respondent is wrong in his contention that because the proceedings under it are pending it operates as a stay of execution. The effect of the garnishee order is to give the creditor a security: it is satisfaction, and, therefore, he could not found a bankruptcy notice upon it.

J. R. Atkin, in reply upon the cases cited. The cases referred to on behalf of the appellant do not apply. The question here depends upon the language of the Act of Parliament, which must be strictly construed. It says that a debtor commits an act of bankruptcy if the creditor has obtained judgment against him "for any amount, and, execution thereon not having been stayed," has served him with a bankruptcy notice which he fails to comply with. It has been argued that execution has not in fact been stayed for the amount mentioned in the notice; but the principle upon which the Act is to be construed is that if you seek to alter the status of a man by making him a bankrupt, you must serve him with a notice specifying the sum due from him, and stating that if that sum is not paid by a certain day you will make him a bankrupt. Moreover, the Act says expressly that the notice must be to pay the judgment debt "in accordance with the terms of the judgment"; and the notice here is not a notice to pay "in accordance with the terms of the judgment," but in accordance with the terms of another document. The cases cited go purely to a consent to a judgment for payment by instalments.

There is nothing to prevent the appellant from proceeding with the issue upon the garnishee order for the 82*l.* 8*s.* 10*d.* he claims to be due to him; and if he fails on that issue, then,

(1) 9 Morr. 103.

according to his view, there will be nothing to interfere with his issuing a fresh bankruptcy notice.

Cur. adv. vult.

VAUGHAN WILLIAMS L.J. The conclusion I have arrived at in this case is one that I somewhat regret, but I feel constrained to arrive at it. It is not a case in which there are, on the part of the debtor, any merits which would predispose one to arrive at a conclusion in his favour.

In this case there was a negotiation between the debtor and the creditor which resulted in an agreement, and that agreement included, amongst other things, an agreement that the debtor owed a particular sum, and that that sum was to be paid by certain instalments. The agreement is not very plain or easy of construction, but generally that was the effect of it. There was also an agreement, by way of collateral security for the due performance of that agreement, that the debtor should consent to a judgment being signed against him. In the agreement nothing is said as to whether the whole of the instalments are to be deemed to become due upon default in payment of any one of them, nor is there anything said with regard to the successive executions on the judgment. A sum of 300*l.* was to be paid down on or before the execution of the agreement, and the judgment debt was to be paid by monthly instalments. Default having been made in the payment of three monthly instalments that had become overdue, a bankruptcy notice was issued, and that bankruptcy notice was issued in respect of the whole of the judgment debt. That notice came under the consideration of the registrar upon an application to set it aside, and it was set aside and, in my judgment, rightly set aside, because it is quite plain that under the agreement the sum was not due. That being so, the judgment creditor presently issues a second bankruptcy notice. That notice is issued for the amount of the overdue instalments, credit being given to the debtor in respect of a sum that had been attached under a garnishee order; and the balance is described as "the amount due on the final judgment."

The question which we have to decide is whether, at the

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time when that second bankruptcy notice was issued, it was a notice served on the debtor, within s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, "requiring him to pay the judgment debt in accordance with the terms of the judgment." I do not think it was. I think it was a notice requiring the debtor to pay a debt in accordance with the terms, not of the judgment, but of an agreement; and I think that in dealing with a section of this nature in an Act of Parliament creating a new legislative act of bankruptcy, the actual language of the section ought to be considered.

In coming to the conclusion that this was not a notice requiring the debtor to pay in accordance with the terms of the judgment, but was a notice requiring him to pay in accordance with an agreement, I think it right to say a word or two as to what the law is with regard to execution under a fi. fa. at common law, irrespective of this particular section. I am far from saying that at common law you could not have an execution for part of a debt: you could have execution for a part of a debt; but if you did issue such an execution, the writ of fi. fa. would have been clearly bad if it did not shew upon the face of it that it was for a part of a debt and not for the whole.

In the present case the notice which was served on the debtor is a notice which in no way shews that it was for part of the debt; and I say further, that this is a notice which does not seem to me to fall within the spirit of the section at all. What the Act of Parliament seems to me to have intended was that it should be an act of bankruptcy if a debtor did not pay an amount which was adjudged to be due from him; and the question ought to be one turning upon the judgment, and not upon the construction of an agreement which may be more or less complicated, and possibly more or less difficult to construe. Taking the view that I do, I think that this notice does not come within the terms of the section.

I only wish to add that nothing I have said will prevent the creditor here from issuing a bankruptcy notice when all the instalments have become due, because then his bankruptcy notice will be "in accordance with the terms of the judgment"; and I also wish to say that nothing in my judgment is at all

meant to exclude the right to issue a bankruptcy notice when, whether by agreement or otherwise, the whole of the judgment debt has become due at the moment when the bankruptcy notice is issued. In such a case, as one often sees in an agreement—as where the whole debt is to become due upon the failure to pay one instalment—it may very well be that the bankruptcy notice could issue; but in the present case I do not think that, at the time the bankruptcy notice was issued, the position of things was such that the notice can be deemed to fall within s. 4 of the Bankruptcy Act.

Romer L.J. I also think that this bankruptcy notice was a bad one.

The judgment is in the ordinary form for a specified sum, and does not, on the face of it, require payment of the amount of the judgment debt by instalments.

Now I think it is clear that, when you have a judgment in the form that we have here, a bankruptcy notice under the Act must require payment of a sum alleged to be due according to the terms of the judgment—that is to say, it must state the amount that is claimed as remaining unpaid on the judgment debt. Clearly, in a bankruptcy notice the debtor is entitled to see from the notice exactly what is claimed to be due on the judgment debt. No doubt a sum might be claimed which is less than the real amount due, and that would not of course be fatal to the notice so long as the notice made it clear that nothing more was claimed to be due on the judgment beyond the amount specified in the notice. But a notice to pay part of a judgment debt, leaving any balance that may be due to be subsequently claimed, is, to my mind, clearly bad.

Now, the notice in the present case does not allege that the balance of the judgment debt is claimed; and it is clear, on the facts, that what is claimed in the bankruptcy notice is only part of the debt, and that something more is claimed to be due on the judgment debt as a whole. That form of notice clearly could only be justified by the special agreement alleged to exist between the parties. That being so, this notice is not one founded simply on the judgment according to its terms; it

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is founded on the judgment as modified by the agreement, and it seems to me that the notice is no better than if it had, on the face of it, set forth the facts and required the debtor to pay only part of the judgment debt, according to the terms of the agreement, outside the judgment. To my mind that is not a notice which, within the provisions of the Act, s. 4, sub-s. 1 (*g*), requires the debtor to pay the judgment debt "in accordance with the terms of the judgment," and therefore it is, in my opinion, bad. The Act should I think, where it specifies acts of bankruptcy, receive a very careful and strict interpretation. On this short ground I think the appeal fails.

STIRLING L.J. In my opinion this appeal fails because at the date when the bankruptcy notice was issued the appellant was not in a position to require his debtor to pay the judgment debt, in the words of the statute, "in accordance with the terms of the judgment." According to the terms of the judgment the debtor was bound to pay at once a sum of 2700*l*. By a collateral agreement the creditor agreed to accept payment by instalments, and so long as the time fixed for payment of the last instalment had not arrived the creditor could not, consistently with that agreement, enforce payment of the whole judgment debt; that is to say, he could not require payment of the judgment debt "in accordance with the terms of the judgment."

Now, at the time when the bankruptcy notice in the present case was issued, default had been made in payment under the agreement of certain of the instalments, but the time for payment of the rest had not arrived. The creditor by his notice claims payment of the overdue instalments—that is to say, of part only of what, according to the terms of the judgment, he is entitled to. I do not think that the Act authorizes the issue of a notice in such a form. It appears to me that in reality the creditor is requiring payment of the debt, not simply in accordance with the terms of the judgment, but in accordance with the terms of the judgment as varied by the collateral agreement. I think this is a material departure from the terms of the statute. I do not think that the Legislature meant to

make non-compliance with a judgment an act of bankruptcy so long as the terms of the judgment were controlled by an outside agreement which might be more or less difficult of construction. The result is that, in my opinion, the creditor will not be entitled to issue a bankruptcy notice until all the instalments provided for by the agreement have become payable.

I wish only to add that, in expressing this opinion, I am not departing from anything which was laid down in the case in the Court of Appeal of *In re Feast* (1), which was referred to in the argument, and by which we are bound. The agreement there contained a stipulation that, if default should be made in payment of any of the instalments, the whole debt should become payable; and there was nothing inconsistent with that agreement in requiring payment of the whole debt when an instalment was omitted to be paid. I agree therefore in the result arrived at by my brethren.

Vaughan Williams L.J. I wish to add one statement that I omitted by mistake from my judgment, and it is this. A bankruptcy notice issued for a smaller sum than the judgment debt by reason of credit being given for amounts already paid is, in my judgment, a notice to pay "in accordance with the terms of the judgment."

[Application for leave to appeal to the House of Lords was refused.]

Appeal dismissed.

Solicitors: *H. H. Wells & Son; H. W. Chatterton.*

(1) 4 Morr. 37.

G. I. F. C.

C. A.

1903

Oct. 30;
Nov. 20;
Dec. 11.

[IN THE COURT OF APPEAL.]

In re SOLOMONS.

Bankruptcy — Misdemeanour — Falsifying Books — Conviction — Discharge — "Special Reasons" — Refusal of Discharge — Period of Probation — Practice — Registrar's Refusal to rehear Application for Discharge — Rehearing before Court of Appeal — Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 11, *sub-ss.* 9, 10 — *Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 8.

The conviction of a bankrupt for an offence against s. 11 of the Debtors Act, 1869, is not in itself an absolute bar to an application for discharge. Upon such an application the Court may, under the discretion given to it by s. 8, sub-s. 2, of the Bankruptcy Act, 1890, of granting or refusing a discharge, take into consideration, as "special reasons" for granting the application, any circumstances connected with the offence which may go in mitigation of it. But it does not follow, if the Court holds that the bankrupt ought to be discharged on the ground of mitigating circumstances, that he is therefore entitled to his immediate discharge, as a matter of right, without any prior period of probation.

Whether good conduct on the part of a bankrupt subsequent to the refusal of his application for discharge is in itself a "special reason" sufficient to support a renewal of his application, *quære*.

Upon an appeal by a bankrupt from the registrar's refusal to hear his application for discharge, the Court of Appeal will, in a proper case, itself hear the application instead of remitting it to the registrar.

On November 24, 1898, a receiving order in bankruptcy was made, upon a creditor's petition, against Lewis Solomons, a fur and skin merchant, and that order was followed, on December 15, 1898, by an order of adjudication.

On January 17, 1899, the bankrupt's public examination was concluded, and on February 18, 1899, the official receiver made his report, stating that the cause of the bankrupt's failure was his excess of drawings over profits on trading, and his dealings with accommodation bills in conjunction with one Gleitzman. The official receiver further reported, under s. 8, sub-s. 3, of the Bankruptcy Act, 1890, that the bankrupt's assets were not of a value equal to 10*s.* in the pound on the amount of his unsecured liabilities; that the bankrupt had omitted to keep proper books of account in his business; that he had continued to trade though knowing himself to

be insolvent; that he had contributed to his bankruptcy by unjustifiable extravagance in living; and that he had been guilty of misconduct in relation to his property and affairs, in accepting bills for the mutual accommodation of himself and Gleitzman, drawn by Gleitzman so as to represent trade bills, and discounted by Gleitzman as such with certain parties.

On February 28, 1899, the bankrupt applied to the registrar for his discharge, but the application was adjourned to March 14, 1899. In the meantime the trustee in the bankruptcy, with the sanction of the official receiver, applied for and obtained an order from the registrar giving him leave to prosecute the bankrupt for alleged offences against s. 11, sub-ss. 9 and 10, of the Debtors Act, 1869, in having, it was alleged, within four months before the presentation of the bankruptcy petition, falsified his books with intent to conceal the state of his affairs.

On March 14, 1899, upon the adjourned application for discharge, the registrar made an order suspending the discharge for five years from January 17, 1899, with liberty to the trustee and the official receiver to apply to vary the order at any time within twelve months.

The order for the bankrupt's prosecution was carried out, and on April 12, 1899, he was tried at the Old Bailey before the Common Serjeant and a jury, and convicted of having committed a misdemeanour under s. 11, sub-ss. 9 and 10, of the Debtors Act, 1869, by falsifying his books in order to conceal a fraudulent preference in favour of a particular creditor, to whom, it appeared, he was under a pressing moral obligation, but sentence was postponed until the next sessions. At the next sessions, on May 8, 1899, the bankrupt came up for sentence, when the Common Serjeant said that in his anxiety to discharge a moral duty towards a creditor he had committed a technical offence, but added that, the jury having found him guilty, it was necessary to pass sentence; and accordingly he ordered the bankrupt to be released from custody (he had been in prison since his conviction) and to enter into his own recognizances to come up for judgment when called upon. In consequence of the conviction the official receiver, acting under

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the leave given him by the order of March 14, 1899, applied to vary that order, and accordingly, on June 27, 1899, the registrar rescinded it, thus refusing the bankrupt's discharge altogether.

On February 19, 1900, the fraudulent preference which formed the basis of the bankrupt's conviction at the Old Bailey came before Wright J. upon a motion by the trustee in bankruptcy to have the payment in question set aside; but the learned judge held that the charge of fraudulent preference was unfounded, and refused the motion with costs.

On April 3, 1900, the bankrupt applied to the registrar to fix a day for the rehearing of his application for discharge, alleging that all the facts were not before the Court on June 27, 1899, when his discharge was, at the instance of the official receiver, refused, and relying in particular upon Wright J.'s decision in his favour. The registrar then fixed April 30, 1900, for the hearing of a preliminary application to grant a day for the rehearing of the application for discharge, with the result that on that day, April 30, he made an order refusing to grant a day. An appeal by the bankrupt from that order to the Court of Appeal was, on June 22, 1900, dismissed with costs, Lord Alverstone C.J., in delivering the judgment of the Court, saying that though there might be circumstances under which the bankrupt might have a right to apply to discharge the order, it would be wrong for the Court to say that they ought to rehear the application then.

On July 11, 1901, a second application by the bankrupt to the registrar for a rehearing was refused.

On May 26, 1903, the bankrupt made a third application for a rehearing; but the registrar considered it vexatious, and made an order refusing to allow it even to be put in the paper for argument.

The bankrupt had, in support of that application, filed an affidavit stating that the effect of the refusal of his discharge was that he was deprived of his means of livelihood, being unable to carry on his former or any other business, and that although he had been offered certain agencies in the fur trade, they were conditional upon his obtaining his discharge; that

the conclusion arrived at by the Common Serjeant and the nominal sentence pronounced, and also the judgment of Wright J., and the further fact that since the judgment of the Court of Appeal of June 22, 1900, he had paid to some of his creditors sums amounting altogether to 300*l.* in reduction of the proved debts, irrespective of the dividend, constituted such "special reasons" for his discharge as were required by s. 8, sub-s. 2, of the Bankruptcy Act, 1890. He further stated that the whole of the facts were not before the Court of Appeal on June 22, 1900; and he added that he was supported in his application for discharge by a large number of creditors.

The bankrupt then appealed from the registrar's last-mentioned order to the Court of Appeal, who, on July 10, 1903, made an order adjourning the appeal generally, and referred the matter back to the registrar for a further consideration of the evidence filed by the bankrupt in support of his application. Thereupon the bankrupt's application for a rehearing was heard by the registrar, who, after considering the bankrupt's affidavit and also hearing certain oral evidence, made an order on August 11, 1903, refusing the application. The registrar delivered a considered judgment, in which he said it had been urged before him that the following new matter disclosed by the evidence required consideration: (1.) that five-eighths of the creditors were willing that the bankrupt should have a discharge; (2.) that the bankrupt had distributed 300*l.* among some of his creditors since the bankruptcy; and (3.) that some people, not old creditors, had come forward and said he was "an honest, hardworking man." But, added the registrar, it seemed quite clear that unless the new matter constituted a "special reason" within s. 8 of the Bankruptcy Act, 1890, no order was possible other than an absolute refusal, and he could not himself think that any of these matters constituted "special reason" within the Act. Accordingly he held that no "special reason" existed in the present case, and that, even if it did exist, the most that could be said was that it would give a jurisdiction on which a discretion might be exercised, and that he himself, with the knowledge he had of this case, should decline to exercise that

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discretion in favour of the bankrupt. He was, therefore, of opinion that there should be no rehearing of the bankrupt's application for an order of discharge.

From the registrar's decision the bankrupt appealed, asking by his notice of appeal that the registrar's order might be reviewed, rescinded, or varied, and that the application for discharge might be reheard.

Oct. 30. *Reed, K.C.*, and *Carrington*, for the bankrupt. What is asked for is that a day may be fixed for the rehearing of the application, and that, if necessary, the rehearing may be taken by this Court instead of by the registrar. It is submitted that the debtor's conduct since his bankruptcy may be taken into account as a "special reason" under s. 8, sub-s. 2, of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71). (1) The registrar was wrong in saying that he had no jurisdiction. The Court has power under s. 104 of the Bankruptcy Act, 1883, to entertain an application by a bankrupt for a review of an order absolutely refusing his discharge: *In re Tobias & Co.* (2); *In re Freeman* (3); *In re Lloyd.* (4) It is not in the interest of commercial morality that a bankrupt should never be able to obtain a discharge.

(1) Sect. 8 of the Bankruptcy Act, 1890, enacts (sub-s. 1) that "A bankrupt may at any time after being adjudged bankrupt apply to the Court for an order of discharge, and the Court shall appoint a day for hearing the application, but the application shall not be heard until the public examination of the bankrupt is concluded."

Sub-s. 2 is, so far as material, as follows:—

"On the hearing of the application the Court shall take into consideration a report of the official receiver as to the bankrupt's conduct and affairs (including a report as to the bankrupt's conduct during the proceedings under his bankruptcy), and may either grant or refuse an absolute order of discharge, or suspend the operation of the order for a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property: Provided that the Court shall refuse the discharge in all cases where the bankrupt has committed any misdemeanor under the Debtors Act, 1869, or the principal Act, or any other misdemeanor connected with his bankruptcy, or any felony connected with his bankruptcy, unless for special reasons the Court otherwise determines . . . ."

(2) (1891) 8 Morr. 80.

(3) (1890) 7 Morr. 38.

(4) (1889) 6 Morr. 297.

[ROMER L.J. I do not understand the decision in *In re Stevens* (1) if the registrar had no jurisdiction.]

The Court has a discretion under s. 8, sub-s. 2: *In re Richards.* (2) If a bankrupt has committed an offence under the Debtors Act, the Court has still a discretion as to giving him an order of discharge under "special circumstances," and his conduct since his bankruptcy may be taken into consideration.

[VAUGHAN WILLIAMS L.J. referred to *Herbert* v. *Sayer.* (3)]

VAUGHAN WILLIAMS L.J. We are of opinion that a primâ facie case for ordering a rehearing has been shewn. We think it desirable that we should deal with the matter ourselves, and that the official receiver and the creditors should have an opportunity of being heard. We will adjourn the hearing of this appeal until November 20. Notice must be given to the official receiver, and an advertisement to the creditors must be issued, stating that the Court of Appeal proposes to deal with the matter on that day.

Nov. 20. *Reed, K.C.*, and *Carrington*, for the bankrupt.

Sir E. Carson, K.C., S.-G., and *Muir Mackenzie*, for the official receiver. The "special reasons" mentioned in s. 8, sub-s. 2, of the Bankruptcy Act, 1890, must be special reasons in relation to the misdemeanour or crime the bankrupt has committed. Under the Bankruptcy Act, 1883, where a bankrupt had been convicted under the Debtors Act, 1869, the Court had no discretion to order his discharge; and s. 8, sub-s. 2, of the Act of 1890 absolutely prohibits his discharge, unless "special reasons" are shewn—that is, in relation to the misdemeanour or crime. Again, the "special reasons" must have been so at the time of the application for discharge: the bankrupt cannot get rid of a conviction by urging as "special reasons" for his discharge matters that have taken place subsequently. The Court can only affix conditions to a discharge if at the time of the application "special

(1) [1898] 2 Q. B. 495. (2) (1893) 10 Morr. 136.
(3) (1844) 5 Q. B. 965.

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reasons" are shewn; if not, the Court has no power to order a discharge. The first part of sub-s. 2 no doubt gives the widest discretion to the Court; but then the proviso introduces a limitation on that discretion, and when such a matter as a conviction is brought to the notice of the Court, the Court must absolutely refuse a discharge. The proviso affords a strong indication of the intention of the Legislature that when a bankrupt has been convicted, it is not a case, unless he can shew special reasons to the contrary, in which he should be free to trade again.

[ROMER L.J. What are "special reasons" within the proviso?]

It may be that the particular offence committed by the bankrupt may, under the circumstances, be of a very trivial nature, and that may be urged as a "special reason."

[ROMER L.J. Ought we not to leave the question as to what may constitute "special reasons" entirely open, and to be dealt with in each particular case?]

There is no authority as to what will constitute "special reasons"; but there is no instance to be found in which a bankrupt has obtained his discharge after his having been convicted of a criminal offence. The fact that there may be evidence shewing that the bankrupt has, since the refusal of his discharge, conducted himself properly and earned the good opinion of several of his creditors, cannot be considered a "special reason."

To say that the good conduct of a bankrupt after his discharge has been refused is a "special reason" for rehearing his application is equivalent to saying that if he merely abstains from doing anything wrong he thereby creates a "special reason" within the meaning of the sub-section.

It is important, in the interests of the public, that the sub-section should not be whittled away.

[VAUGHAN WILLIAMS L.J. That is quite true; but at the same time I think the Court should not introduce into the sub-section limitations that are not there.]

VAUGHAN WILLIAMS L.J. The question we have to consider with regard to this section—s. 8, sub-s. 2, of the Bank-

ruptcy Act, 1890—is, What is the meaning of the words "special reasons" mentioned at the end of the proviso? The proviso runs thus: [The Lord Justice read it, and continued:—]

What, then, is the meaning of these words "special reasons"? So far as the language of the section is concerned there is no limitation placed upon the words "special reasons"; it is left to the discretion of the Court to say what may be "special reasons."

Now I am very anxious not to say anything more than is necessary for the decision of this case. I do not wish unnecessarily to fetter the judgment or decision of any Court hereafter as to what may or may not, in any particular case that may occur, constitute "special reasons." But the contention of the Solicitor-General was that you could not take into consideration either the circumstances under which the offence was committed and treat them as constituting a special circumstance, nor could you take into consideration the conduct of the bankrupt after his discharge had been refused and treat that as a special circumstance.

Now, with regard to the second contention of the Solicitor-General, I do not think it necessary for the decision of this case that we should decide that. I was very much impressed with the cogency of the argument of the Solicitor-General that to say that the good conduct of a man subsequent to his bankruptcy and the refusal of his discharge was a special reason, was to say that a man by merely abstaining from doing anything that was wrong thereby created a "special reason" within the meaning of this section. It is not necessary for us to decide that question, and therefore I do not propose now to decide what may or may not be the effect of good conduct as constituting a "special reason." I pass that by, merely saying that I felt the full force of the Solicitor-General's argument upon that point.

I will now deal with the other part of the Solicitor-General's contention—that is, that, given a conviction, one cannot take into consideration, as constituting a special circumstance, the object of the offender when he committed the offence or the

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circumstances under which the offence was committed. I think that you can. Taking this particular case, I think that the very fact that the Common Serjeant who tried the case dealt with it in the way he did is a special circumstance which may be and ought to be taken into consideration.

But does it necessarily follow that, because the learned judge so dealt with the offence as to shew that in his opinion it was not, comparatively speaking, a grave instance of the offence defined by the Debtors Act, 1869, the bankrupt is entitled to ask for his immediate discharge, or to wait a few weeks and then ask for his discharge? I think not. When once you have the fact that there are circumstances connected with the offence which go in mitigation of it, you have a special circumstance; but it does not follow that the debtor is entitled to his discharge without a period of probation. The obvious intention of the Legislature is that a man who has been made bankrupt and who has been guilty of misconduct of the sort described in sub-ss. 9 and 10 of s. 11 of the Debtors Act, 1869, should not be immediately allowed to resume the exercise of his rights as a citizen in conducting business of a commercial character. It is right, therefore, that an immediate discharge in all such cases, even though there may be a special circumstance, should not be granted; there should be a period of probation during which, if the bankrupt conducted himself badly, he would forfeit all chance of taking advantage of the mitigating circumstances which were present when the offence was committed. On the other hand, if a sufficient time has elapsed to enable one to form a judgment whether to allow a man to trade would be a dangerous thing for the community, then, if he shews that he is not likely to be a danger in that respect to the community, it seems to me it may be right to accede to his application. Indeed, I gather that to be the meaning of Lord Alverstone's observations upon the previous hearing of this very matter before the Court of Appeal.

Now, under the circumstances of this case, I think the registrar should have granted a day for the rehearing of the bankrupt's application for discharge. I am expressing no

opinion as to what ought to be our judgment in regard to whether the order refusing the discharge should now be varied or not: that is quite a different matter. But I think a sufficient "special reason" for a rehearing of the application for discharge existed in this case by reason of what happened at the trial, and by reason also of the light thrown by the investigation before Wright J. upon the bankrupt's conduct in respect of the very transaction which constituted the basis of the conviction, and as to which Wright J. held that the bankrupt's object was not as the trustee and official receiver both at one time obviously thought it was—namely, a fraudulent preference. In my opinion, therefore, the circumstances I have mentioned do constitute "special reasons" for a rehearing of the bankrupt's application for discharge; and we will ourselves dispose of the question by hearing the appeal from the refusal of the registrar to vary the order of discharge. The onus will, of course, be upon the bankrupt.

ROMER L.J. This case has got into such a tangle, and the circumstances are so peculiar, that I think it advisable to allow the bankrupt's application for discharge to be reheard, and then to rehear it before ourselves, and so dispose of the matter. Personally I desire to say that, as at present advised, in doing this I am not to be supposed to hold that good conduct of a bankrupt in commerce since his bankruptcy would in itself, apart from other considerations, form a "special reason" within the meaning of s. 8, sub-s. 2, of the Act of 1890. I do not think it useful or advisable to try and define what are "special reasons," or to limit the Court by some sort of attempted definition; but in hearing an application for discharge on the ground of "special reasons," and in deciding what should be done upon it, I think the Court cannot disregard the conduct of the bankrupt during the bankruptcy, and especially with reference to the act of misdemeanour of which he may have been guilty.

STIRLING L.J. I should like also to say for myself that, in my judgment, in any view of the facts, there are "special

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reasons" in the present case within the meaning of the subsection. First, there is the mode in which the case was dealt with by the learned judge who tried it; and to that I think great weight ought to be attached. But the case does not rest there, for the circumstances connected with the misdemeanour of which the bankrupt was found guilty at the trial were subsequently investigated and adjudicated upon by Wright J., and the conclusion at which he arrived tends to corroborate the accuracy of the judgment which the learned judge who tried the case formed at the trial.

In those circumstances it does seem to me that there are "special reasons" here.

I must also add this: I do not forget that both these facts were before this Court on June 22, 1900, when an application to fix a date for hearing had been made before the learned registrar and refused by him, and this Court affirmed that decision. I do not think that that amounted to a decision by this Court that there were no special circumstances in this case: the observations of Lord Alverstone seem to me to prove the contrary, for they appear to amount simply to this, that, although there were, or at any rate might be, special circumstances in the case, the time had not then arrived at which they ought to be taken into consideration by this Court or by the registrar, or by the Court which had jurisdiction to hear the application. Three years have since elapsed, and I am not prepared to say that sufficient time has not elapsed. I desire to say no more, leaving the rest of the circumstances to be considered when we hear the further argument.

Appeal allowed.

Dec. 11. The bankrupt's application for an order of discharge now came on for rehearing.

Reed, K.C., and *Carrington*, for the bankrupt, stated that, in answer to the advertisement to creditors, thirty creditors had expressed their wish that there should be a rehearing and that the bankrupt should now have an opportunity of earning his living. No creditor had objected.

[VAUGHAN WILLIAMS L.J. I think our decision ought not to turn upon the wishes of the creditors in the bankruptcy. We wish to know how the bankrupt has comported himself since the bankruptcy.]

The evidence was then read of persons who were acquainted with the bankrupt's conduct since his bankruptcy.

VAUGHAN WILLIAMS L.J. We think the evidence is sufficient to shew that the bankrupt has conducted himself properly since his bankruptcy.

Muir Mackenzie, for the official receiver, submitted the matter to the Court. He read the official receiver's report of February 18, 1899, as shewing the nature of the bankrupt's conduct in his business which led to the original suspension of his order of discharge for five years, independently of the offence of which he was afterwards convicted.

The judgment of Wright J. of February 19, 1900, on the question of fraudulent preference was also read.

VAUGHAN WILLIAMS L.J. We think that the bankrupt ought not to be deprived of his discharge in perpetuum. But at the same time the report of the official receiver did state matters which must weigh very heavily against the bankrupt, and it is clear that the order suspending his discharge for five years was not made by reason of the offence of which he was subsequently convicted. Whatever view may be taken of his object, there is no doubt that he did keep books calculated to mislead—that there was a falsification of his books. We think the order of discharge should be suspended for one year beyond the five.

ROMER and STIRLING L.JJ. concurred.

Order accordingly.

Solicitors: *Raphael & Co.; The Solicitor to the Board of Trade.*

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1903
Nov. 30.

[IN THE COURT OF APPEAL.]

RASCH & CO., APPELLANTS; WULFERT, RESPONDENT.

Practice—Jurisdiction—Arbitration—Application to enforce Award—Service of Summons without the Jurisdiction—Arbitration Act, 1889 (52 & 53 *Vict.* c. 49), *ss.* 1, 12.

An award had been made against the appellants, who were foreigners resident out of the jurisdiction, in an arbitration alleged to have been held in pursuance of a provision contained in an agreement between the appellants and the respondent to the effect that, in the event of any dispute arising under the agreement, the same should be submitted to arbitrators to be appointed, to which arbitration, however, the appellants had refused to be parties :—

Held, that there was no jurisdiction to allow service on the appellants out of the jurisdiction of a summons for leave to enforce the award under the Arbitration Act, 1889, s. 12.

APPEAL against an order made by Ridley J. at chambers as after mentioned.

Upon an application ex parte by the respondent, Wulfert, a master had given leave for the issue of a summons directed to the appellants, who were foreigners resident out of the jurisdiction, for leave to enforce the award of an arbitrator as a judgment or order to the same effect under s. 12 of the Arbitration Act, 1889, and for service of the summons by sending a copy of it by post addressed to the appellants in Germany, and by leaving a copy with their solicitor in London. The award sought to be enforced stated, in substance, (inter alia) that, by an agreement in writing between the appellants and the Hanover Wall Paper Company (under which style the respondent carried on business), the former appointed the latter to be sole agents for the sale of their goods in the United Kingdom for three years; that it was provided by the agreement that, in the event of any dispute between the parties arising thereunder, the same should be submitted to two arbitrators, one to be appointed by each of the parties, and subject to the provisions of the Arbitration Act, 1889; that, a dispute having arisen within the meaning of the

agreement, the Hanover Wall Paper Company had appointed an arbitrator in the matter, but the appellants, upon being called upon, had failed to do so, and thereupon the Hanover Wall Paper Company had appointed their arbitrator to act as sole arbitrator; that, the arbitrator so appointed having given notice to the parties of an appointment to proceed with the arbitration, the respondent attended, but the appellants did not attend before him; and that the arbitrator then proceeded with the reference in their absence, and awarded that they should pay to the respondent a certain sum as damages for breach of the agreement. Upon the hearing of the summons the appellants appeared under protest, and contended that there was no jurisdiction to allow service of the summons upon them out of the jurisdiction. The master decided in favour of that contention, and dismissed the application. Upon appeal to the judge, he reversed the decision of the master as to the service of the summons, and referred the matter back to him to determine on the merits, but gave leave to appeal.

Montague Lush, *K.C.*, and *Gover*, for the appellants. There was no jurisdiction to allow service of the summons on foreigners resident out of the jurisdiction. Furthermore, there was no valid arbitration or award in this case.

[*J. R. Atkin*, for the respondent, objected that the second point could not be raised on the appeal, as it had not been gone into or formed the subject of decision at chambers, the application having been dismissed by the master on the question of jurisdiction to allow service of the summons; and that it must therefore be taken for the purposes of the appeal that the award was valid.]

It is entirely denied by the appellants that there was any valid award, but, assuming for the present that there was one, it is clear that there was no jurisdiction to allow the service of the summons on the appellants. It is well settled that substituted service can only be allowed where there might lawfully have been actual service. Apart from statutory enactment, the general principle is that the Court cannot issue

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process for service on foreigners out of the jurisdiction. The only statutory provisions for the issue of process for service out of the jurisdiction are those contained in Order XI., r. 1, which only provides for the service of writs of summons and notices of such writs. It was held in *In re Busfield* (1) that the Court could not order service of an originating summons out of the jurisdiction. Such a summons as was issued in this case appears to come within the definition of an originating summons given by Order LXXI., r. 1.

J. R. Atkin, for the respondent. It must be taken for the purposes of the present appeal that the award is valid. The case of *In re Busfield* (1) has no application. There is no analogy between the summons issued in this case, and the originating summons in that case. There the proceeding was initiated by the issue of the summons, and there was no question of a submission to the jurisdiction by a person not within it, previously to service of the summons. In the case of an arbitration within the Arbitration Act, 1889, the application for leave to enforce the award under s. 12 is merely a step in a proceeding in which the party must be taken to have already submitted to the jurisdiction. It may be admitted that, apart from statute, there can be no service of process initiating a proceeding in an English Court upon a person who is outside the jurisdiction and who has not submitted to it. But there is no question here of serving any such process. By s. 1 of the Arbitration Act, 1889, it is provided that a submission is to have the same effect in all respects as if it had been made an order of Court; and by s. 27 "submission" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not. Therefore, by force of the Act a person who enters into such an agreement to submit thereby submits to the jurisdiction conferred upon the Court by the Act. Sect. 12 contains no provision for any summons, such as an originating summons, by which a proceeding is initiated. The enforcement of the award is the final step in the arbitration proceedings, which have from the first been subject to the control of

(1) (1886) 32 Ch. D. 123.

the Court. Of course, as a matter of natural justice, it is part of the proper procedure that an opportunity should be given to the party against whom the award is to be enforced of appearing and being heard, and for that purpose some summons or notice must be served upon him; but there is no question of making him by such service subject to the jurisdiction. He is already subject to the jurisdiction by virtue of his submission to arbitration. Unless this be so, the result will follow that, in every case of an arbitration within the meaning of the Act in this country between a person within the jurisdiction and a person without it, the Court will have no control over the arbitration, and will not be able to exercise any of the powers given by ss. 1, 5, and 6 of the Act.

Montague Lush, K.C., for the appellants, was not called on to reply.

COLLINS M.R. I am of opinion that this appeal must be allowed. The question arises as follows. The respondent alleged that he had obtained an award in an arbitration against the appellants, who are foreigners resident out of the jurisdiction; and he applied ex parte for leave to serve a summons upon the appellants out of the jurisdiction by means of substituted service, for the purpose of enforcing the award in this country under s. 12 of the Arbitration Act, 1889. Upon that application the master was disposed to think that there was jurisdiction to grant such leave, and accordingly granted it; but, ultimately, upon the hearing of the summons, he decided that there was no jurisdiction to order service of a summons for leave to enforce the alleged award out of the jurisdiction, and he therefore dismissed the application. The matter came on appeal before the judge, who took a different view, and held that there was jurisdiction to order service of such a summons out of the jurisdiction. The sole point now is whether there was such jurisdiction. It was admitted that there can be no jurisdiction in an English Court to allow service of process out of the jurisdiction except by statutory enactment. That being so, the question arises whether there is any such enactment applicable to this case. It is clear that

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Collins M.R.

the case does not come within Order XI., r. 1, which provides for the service of writs of summons, or notices of writs of summons, out of the jurisdiction in certain cases. It has been held that, an originating summons not being a writ of summons, though, in substance, the nearest possible approach to one, and therefore not being within that rule, an order cannot be made for service of such a summons out of the jurisdiction. The counsel for the respondent could not impugn the principle of that decision, but he contended that it was a mistake to suppose that it was applicable to the present case. He argued that in this case there was a valid award, which presupposes the fact that the appellants had submitted to the jurisdiction, and consequently they must be treated as if they were within it; that what was asked for was in effect a summons against persons within the jurisdiction, because the appellants had become parties to a submission to arbitration in this country, and all the subsequent proceedings were ancillary to that submission. The whole of the respondent's contention is based upon the assumption that the appellants had been brought within the jurisdiction at the time when the summons was issued. But how had they been brought within the jurisdiction? It does not appear to me that the existence of the award against them is, as has been suggested, sufficient evidence that they had submitted to the jurisdiction. There is a distinction, I think, for this purpose between an agreement to refer disputes and an actual submission of a dispute to a particular arbitrator. A mere contract to refer disputes does not seem to me to amount for this purpose to a submission in fact to the jurisdiction of the arbitrator here. The person so contracting may be under a contractual obligation to submit, but I do not think that he, therefore, can be considered to have actually submitted to the arbitration here, so as to give an English Court jurisdiction over him. That being so, the basis of the contention for the respondent appears to me to fail. He, therefore, must, in order to succeed, be able to point to some statutory procedure by virtue of which an English Court is entitled to exercise jurisdiction over the appellants, who are out of the jurisdiction. I do not think that he has succeeded

in doing so, or in shewing that he is in any better position for this purpose than if this were an originating summons. For these reasons I think the decision of the judge was wrong, and the appeal must be allowed.

MATHEW L.J. I am of the same opinion. The cases in which service of process out of the jurisdiction may be allowed are distinctly specified in Order XI., r. 1, and I do not think that we are at liberty to go beyond the terms of the rules and regulations which, after most careful consideration, were laid down by that order in reference to this subject, unless we find some clear statutory authority for doing so.

The respondent's counsel suggests that such an authority may be found in the Arbitration Act, 1889, and that any foreigner resident out of the jurisdiction, who is a party to a submission, must be taken for this purpose to be within the jurisdiction. I can find no provision to that effect in express terms, and I am not prepared to say that by implication any such jurisdiction as that contended for is given to an English Court. As has been pointed out in argument, it has been held that an order cannot be made for the service of an originating summons out of the jurisdiction. That being so, I do not see any reason for holding that the summons in this case could be allowed to be served on the appellants.

Appeal allowed.

Solicitor for appellants: *W. Sanders Fiske.*
Solicitors for respondent: *Swepstone & Stone.*

E. L.

C. A.
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Nov. 5.

[IN THE COURT OF APPEAL.]

BOSTON *v.* BOSTON.

Statute of Frauds—Interest in Land—Acquisition of Interest not dealt with as part of Contract—Request to another to acquire Interest—Promise to pay Amount expended—29 Chas. 2, c. 3, s. 4.

A wife residing with her husband, and desirous of moving into a larger house, requested him to buy the residue of the lease of a particular house, and made a verbal promise to him that if he did so she would pay to him the amount of the purchase-money. The husband bought the lease, and the parties moved into the house and resided there. In an action by the wife against her husband he counter-claimed for the amount that he had paid:—

Held, that, as the husband was not bound by the terms of the contract to acquire any interest in land, the promise to pay if he did so was not a contract to which the 4th section of the Statute of Frauds applied.

APPLICATION of the plaintiff for judgment, or for a new trial, in an action tried before Wills J. with a jury.

The action was brought by a wife against her husband, who counter-claimed for a sum of 1400*l.*, alleged to be due to him from the plaintiff upon a verbal contract. The question raised in the appeal was whether the contract was one that, to be enforceable, was required by the 4th section of the Statute of Frauds to be in writing.

The effect of the allegations in the counter-claim and particulars was that the plaintiff and the defendant were residing together; that the plaintiff was desirous of removing to a larger house called "Charlwood"; that she requested the defendant to purchase the residue of the lease of Charlwood, and verbally agreed with him that if he would do she would, when she received sufficient money out of funds coming to her under her father's will, pay to him the amount of the purchase-money; that the defendant in pursuance of this agreement purchased the residue of the lease of Charlwood for a sum of 1400*l.*, and that he and his wife removed into the house and resided there; that the plaintiff had received money sufficient

to pay the 1400*l.*, but had not done so. The plaintiff in her defence to the counter-claim denied that she had made the alleged promise, and further pleaded that s. 4 of the Statute of Frauds had not been complied with. The defendant in reply pleaded part performance.

At the trial of the action the jury found for the defendant on the counter-claim, and judgment was entered for him for 1400*l.*

The plaintiff appealed.

Montague Lush, K.C., and *J. R. Macoun*, for the plaintiff. The contract alleged in the counter-claim cannot be enforced because it is not in writing. The 4th section of the Statute of Frauds applies to "any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them." It is not necessary, in order to bring a case within the statute, to shew that the person to be charged had an interest in the land which was the subject-matter of the contract: *Horsey* v. *Graham*. (1) It is sufficient that the primary object of the contract is the acquisition of land or of an interest in land. The judgments in *Mann* v. *Nunn* (2) shew that the Court did not treat s. 4 of the statute as applying only where an interest in land passes from one party to the other, but as applying generally to a contract that treats of an interest in land. The plaintiff was not bound to pay till the defendant had acquired the land, and if so the contract on her part to pay related to the acquisition of an interest in land. Secondly, there was no unequivocal act, referable to the agreement, which would amount to part performance, to take the case out of the statute: *Maddison* v. *Alderson*. (3) If the consideration was that the defendant should acquire and pay for the land, the mere execution of the consideration was not part performance: *Cocking* v. *Ward*. (4)

Pickford, K.C., and *J. D. Crawford*, for the defendant. *Horsey* v. *Graham* (1) was an action, not for commission, but on

(1) (1869) L. R. 5 C. P. 9.
(2) (1874) 43 L. J. (C.P.) 241.
(3) (1883) 8 App. Cas. 467.
(4) (1845) 1 C. B. 858; 15 L. J. (C.P.) 245.

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a contract to procure the transfer of a public-house, and in the judgments of Bovill C.J. and Brett J. it is clearly pointed out that the contract itself dealt with the acquisition of an interest in land. To apply to the present case the words of Lush J. in *Angell* v. *Duke* (1), "this promise was made as an inducement to the plaintiff to enter into the arrangement." No doubt the defendant became tenant of the house mentioned in the contract, but he did not do so under the contract. Nor did the plaintiff acquire any interest in land; all she obtained was the fulfilment of her expectation of residing in the house when it should be bought. *Mann* v. *Nunn* (2) is an authority in the defendant's favour, and does not support the argument for the plaintiff. In that case there was a verbal agreement to put a messuage into a condition fit for habitation, and the agreement was held not to relate to an interest in land within the 4th section of the Statute of Frauds. Even if the contract were within the statute, then the purchase by the defendant was part performance; and if it cannot be treated as part performance, that fact shews that the contract is not within the statute.

Montague Lush, K.C., in reply. In the view put forward as to the decision in *Angell* v. *Duke* (3), that case is in conflict with *Cocking* v. *Ward* (4), in which all that the plaintiff had to do was to persuade the landlord to let the defendant have the house. Cases of collateral agreements such as *Angell* v. *Duke* (3) are not relevant in deciding this case.

COLLINS M.R. This is an appeal from a judgment of Wills J. in a case tried with a jury. The question arises upon a counter-claim in an action brought by a wife against her husband. The counter-claim is founded upon a contract substantially to the effect that if the defendant would buy Charlwood the plaintiff would make him a present of it. The husband did buy Charlwood and paid for it 1400*l.*, which he claims, but which the lady has refused to pay. The jury at the trial of the action

(1) (1875) L. R. 10 Q. B. 174, at p. 178.
(2) 43 L. J. (C.P.) 241.
(3) L. R. 10 Q. B. 174.
(4) 1 C. B. 858; 15 L. J. (C.P.) 245.

gave their verdict in favour of the defendant, and judgment for 1400*l.* was entered for him on the counter-claim.

The point taken on behalf of the plaintiff is that the contract relied on is one that comes within s. 4 of the Statute of Frauds, and that, as there is no memorandum in writing relating to it, no action can be maintained upon it. In support of this view it is argued that the contract set up is for the sale of land, or at all events that it is a contract for sale of an interest in or concerning land. Looking at the contract, its terms do not embrace as part of the contract the acquisition of any interest in land. Undoubtedly the wife promised that if the husband bought Charlwood she would in that case repay him the amount of the purchase-money; but it is no part of the contract that he is to buy the house; and that being so, the contract does not embrace an interest in land. There is no case, so far as I am aware, to be found in the books in which the statute has been held to apply unless by the terms of the contract the sale of land, or some interest in or concerning land, was dealt with as part of the contract. In this case there is a contract by the wife to pay her husband a sum of money quantified by the amount that he would have to pay for the acquisition of an interest in land; but he did not by the contract undertake to acquire any interest in land. If and when he did acquire such an interest he could ask for reimbursement of the amount of the purchase-money. The case is outside the statute, not only on principle, but upon the authority of *Angell* v. *Duke* (1), which is directly in point, especially having regard to the reasons given for the decision in the judgment of Lush J.

MATHEW L.J. I am of the same opinion. It seems to me that s. 4 of the Statute of Frauds means that any contract for any interest in or concerning land must, to be enforceable, be expressed in writing, and that the contracts dealt with in the section must be contracts operating on an interest in land. In this case the contract created no obligation to acquire an interest in land, it did not affect the owner of the land mentioned, nor did it create or deal with the interest of any one in it. The

(1) L. R. 10 Q. B. 174.

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contract only dealt with a sum of money which was to be applied to indemnify the husband in respect of the amount of the purchase-money if he bought the house. The decision in *Angell* v. *Duke* (1) seems to me to be directly in point in the case before us, and the valuable judgment of Lush J. as to what agreements come or do not come within the section is an authority in the defendant's favour. If the argument addressed to us on behalf of the plaintiff is right, it would lead to some strange consequences; for instance, it would be necessary to go so far as this—that an ordinary contract to pay commission on the sale or letting of a house would not be enforceable unless in writing. In my opinion the statute has no application in this case, and the appeal must be dismissed.

COZENS-HARDY L.J. I agree, and have nothing to add.

Appeal dismissed.

Solicitors for plaintiff: *Lawson Lewis, Welch & Wenham, for L. Broadbent, Darwen.*

Solicitors for defendant: *Monro, Slack & Atkinson.*

(1) L. R. 10 Q. B. 174.

A. M.

In re PARRY. *Ex parte* SALAMAN.

1903 *Nov.* 30.

Bankruptcy—Post-nuptial Settlement—Power of Revocation with Consent of Trustees—Partial Revocation in order to pay Debts on condition of further Property being settled—Resettlement—Bankruptcy of Settlor—Voluntary Settlement—"Purchasers for Value"—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 47.

In 1899 A. by a post-nuptial deed settled property upon trust for himself for life and, after his death, upon trusts for his widow and children (if any), with an ultimate trust, in default of issue, for his next of kin. The deed contained a power of revocation with the consent of the trustees, which they had an absolute discretion to give or to withhold. In 1902 A. applied to the trustees to consent to a partial revocation of the settlement in order to raise 1600*l.* out of the settled funds to pay pressing liabilities; but they refused except upon the express condition that he brought into settlement his life interest under the deed of 1899, and also a reversionary interest to which he had since become entitled. A. agreed to this, and, in consideration of the consent and of the 1600*l.*, he, in December, 1902, by deed assigned to the trustees his life interest under the deed of 1899 and the reversionary interest upon trusts which gave them during his life an absolute discretion to apply the income for benefit of A. or of his wife or children, and, subject thereto, upon similar trusts for his wife and children and next of kin, as in the deed of 1899, with a like power of revocation. In September, 1903, A. was adjudicated bankrupt in respect of debts incurred in that year, and the trustees refused to consent to any revocation of the deed of December, 1902:—

Held, that the trustees were not "purchasers for value" within the meaning of s. 47 of the Bankruptcy Act, 1883; and that, therefore, the deed of December, 1902, was a voluntary settlement and void against A.'s trustee in bankruptcy to the extent necessary to pay the debts in the bankruptcy.

THIS was an application by the trustee in bankruptcy to set aside a deed executed by the debtor on December 29, 1902, under these circumstances.

By a post-nuptial settlement dated October 4, 1899, the debtor conveyed to trustees personal property of the estimated value of 3500*l.*, upon trust for himself for life, and after his decease upon trusts for his wife and issue (if any), with an ultimate trust, in default of issue, for his brothers and sisters.

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The deed contained a power for the debtor at any time or times thereafter, with the written consent of the trustees or trustee for the time being (which consent they or he should have an absolute discretion to give or withhold without incurring any responsibility in that behalf), by any deed or deeds, revocable or irrevocable, wholly or partially to revoke and make void the trusts, powers, and provisions therein declared and contained of and concerning the trust funds thereby settled, and to declare such new or other trusts of and concerning the same, or any part or parts thereof, as he might think fit for the benefit of himself or any other person or persons. The debtor executed this deed, not in consideration of his marriage, but on the persuasion of his relatives, who desired to protect him against his extravagant habits.

The debtor was a purser in the employ of a steamship company, and in December, 1902, he was some 625*l.* wrong in his ship accounts, and applied to his trustees to pay that sum for him out of the trust funds. They agreed to help him by providing a sufficient sum to meet all his liabilities if he would make a provision for his wife by executing a settlement of his life interest under the deeds of October 4, 1899, and would also bring into settlement a reversionary interest worth about 960*l.* to which he had since become entitled, in such a way that the trustees should have an absolute discretion as to dealing with the capital and income of the trust funds for the benefit of the debtor, his wife and children. The debtor agreed to this, and the transaction was carried out by two deeds of even date of December 29, 1902. By one of these deeds the debtor, with the consent of the trustees, revoked the trusts, &c., of the deed of October 4, 1899, so far as was necessary to raise and provide a sum of 1600*l.*, with which the 625*l.* and other liabilities of the debtor were paid. By the other deed, after reciting the deed of revocation of even date, and that the trustees had concurred in the same upon the express condition that the debtor should in consideration of their concurrence execute such a settlement as was thereinafter contained, it was witnessed that the debtor did thereby assign to the trustees his said reversionary interest, and also his life interest under the deed of October 4, 1899, to

hold the same upon the trusts, &c., thereinafter declared; and it was thereby declared that the trustees or trustee for the time being should in their and his absolute discretion from time to time during the life of the debtor pay or apply all or any part of the capital or income of the trust premises for the maintenance, and personal support or benefit, of all or any one or more to the exclusion of the others or other of the following persons—namely, the debtor and his wife and children (if any); and after his death upon trusts for his wife and children (if any), with an ultimate trust for his brothers and sisters. This deed contained a power of revocation similar in all respects to that in the deed of October 4, 1899.

In September, 1903, the debtor was adjudicated bankrupt in respect of debts incurred by him since December, 1902. He was living apart from his wife; there had been no issue of their marriage; and the trustees were paying the income of the trust estate to the wife.

The trustee in bankruptcy applied to the trustees of the deed of December 29, 1902, for their consent to its revocation, which they declined to give; and thereupon the trustee in bankruptcy now applied to the Court for a declaration that the deed of December 29, 1902, was void as against him on the ground that it was a voluntary settlement under s. 47 of the Bankruptcy Act, 1883.

H. Reed, K.C., and *F. Mellor*, for the trustee in bankruptcy. The question is whether the trustees of the settlement of December, 1902, are "purchasers for valuable consideration" within the meaning of s. 47. That section is similar in its terms to s. 91 of the Bankruptcy Act, 1869, and in *Ex parte Hillman* (1) it was held that the word "purchaser" in s. 91 meant a buyer in the ordinary mercantile sense, and not a purchaser in the strict legal sense, of the word. That ruling was approved in *Hance* v. *Harding*. (2) Here it cannot be said that the trustees of the 1902 settlement were buyers in a commercial sense. Their consent was not "valuable

(1) (1879) 10 Ch. D. 622. (2) (1888) 20 Q. B. D. 732.

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consideration," nor did the payment of the 1600*l.* constitute them "purchasers" within the section. They gave no real quid pro quo. They brought nothing into the settlement, nor did any third party, as in *Hance* v. *Harding*. (1) The 1600*l.* was really the debtor's own money, and by the deed of December, 1902, he simply substituted property of his own for certain stocks and shares in the settlement of 1899 which were readily convertible into the required sum. It is submitted, therefore, that the deed of December, 1902, is a voluntary settlement within s. 47, and must be set aside so far as is necessary to satisfy the creditors in the bankruptcy.

Buckmaster, *K.C.*, and *Hansell*, for the settlement trustees. The settlement of 1899, though voluntary, was a perfectly valid settlement in 1902, and could not be set aside or attacked by any one, and the clear answer to s. 47 is that 1600*l.* of the capital moneys under that settlement were raised and paid as the consideration for the execution of the settlement of December, 1902. That was valuable consideration. It was releasing or surrendering property under the first settlement in consideration of other property being substituted for it, and the principle of *Ex parte Berry* (2) applies. Further, the case of *Hance* v. *Harding* (1) modifies the decision in *Ex parte Hillman*. (3) Lord Esher in *Hance* v. *Harding* (1) points out that in *Ex parte Hillman* (3) "The trustees of the settlement, who were alleged to be purchasers, had not given something to procure something for other persons." But that is what the trustees in the present case have done. They represented, not only the debtor, but all the other beneficiaries —the wife, the possible issue, the next of kin; and it was competent for them, in considering whether they would give their consent, to bargain with the debtor on behalf of their other beneficiaries that they would not release the rights of the other beneficiaries in the capital trust funds unless the debtor brought into settlement other property of equivalent value. That was good consideration, a real quid pro quo, and

(1) 20 Q. B. D. 732. (2) (1812) 19 Ves. 218.
(3) 10 Ch. D. 622.

validates the settlement of December, 1902, and takes it out of the mischief of s. 47.

Reed, K.C., in reply.

WRIGHT J. The view I take of this case is based entirely upon the fact that the trusts are revocable at the request of the settlor with the consent of the trustees; and, having regard to that fact, it seems to me that I ought not to hold that this transaction is a purchase for valuable consideration within the meaning of s. 47, as construed in *Ex parte Hillman* (1), and further explained in *Hance* v. *Harding*. (2) What took place in truth was this. The settlor being anxious to obtain a present use of portions of the settled assets, which were capable of being realized at the time, was willing to bring in other assets, which probably were not capable of being realized at the time, on the terms that the trustees, who had a discretionary power of consenting to revocation of the trusts, should exercise their discretionary power and consent to his taking out of the old assets the portion which he required. Now the only question is, whether the consent which they gave was a consent given by them as "purchasers for valuable consideration" within the meaning of the section. I do not think it was really a transaction of purchase at all in the sense in which the word "purchaser" is construed in the two cases to which I have referred. They did not, as it seems to me, purchase for any price whatever. The proper description of what they did is, that they only exercised a fiduciary power to consent to terms which satisfied them that the trusts would not suffer. In one sense it may be said that the consideration which was given for a sale of assets for 1600*l.* really came from the debtor himself; but the ground for the view which I take is that it was not a bargain of purchase at all as between vendor and purchaser, but merely a partial substitution of one trust asset for another in the discretion of the trustees. I think, having regard to the decisions in the cases to which I have referred, that that cannot properly be described as a purchase by the trustees for valuable consideration within

(1) 10 Ch. D. 622. (2) 20 Q. B. D. 732.

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the meaning of s. 47. I hold, therefore, that the trustee in bankruptcy is entitled to undo the settlement of December, 1902, so far as regards what was brought into settlement under it—that is to say, the debtor's life estate under the first settlement and the reversionary interest—but only so far as may be necessary to pay the creditors in the bankruptcy.

Solicitor for trustee in bankruptcy: *E. M. Lazarus.*
Solicitors for settlement trustees: *Walters, Deverell & Co.*

H. L. F.

1903

Dec. 7, 12.

In re JOHNSON JOHNSON. *Ex parte* MATTHEWS AND WILKINSON *v.* JOHNSON JOHNSON AND DIBB.

Bankruptcy—Settlement of Settlor's own Property—Limitation to Settlor for Life determinable on Bankruptcy—Validity.

By a settlement made in 1893 the settlor assigned property to trustees on trust to pay to him the annual income until he was declared bankrupt; thereafter his rights were to cease, and the trustees were to have power to apply at their discretion the income or any part thereof for his personal maintenance and support, and were to apply the residue for the benefit of his children, if any, or to accumulate it and add it to the corpus, which was ultimately to go to his relatives. In 1900 the settlor was adjudicated bankrupt, and the trustee in bankruptcy applied to set aside the settlement, and it was set aside so far as was necessary to pay the bankrupt's debts provable in the bankruptcy. The trustees of the settlement by consent raised a sufficient sum to pay the bankrupt's debts in full and the costs, but the bankruptcy was not annulled. In 1902 the settlor was adjudicated bankrupt for the second time, and the trustee in that bankruptcy applied again to set aside the settlement, but was refused on the ground that at the time of making the settlement the bankrupt was in a position to pay his debts without the aid of the settled property. The trustee in bankruptcy then applied for a declaration that the bankrupt's life estate under the settlement vested in the trustee in bankruptcy. Throughout these transactions the bankrupt was unmarried.

Held, that the first bankruptcy had operated under the settlement as a forfeiture of the settlor's life estate, and that it did not, therefore, vest in the trustee of the second bankruptcy.

APPEAL from the decision of the county court judge of Lancashire sitting at Manchester.

The following statement of facts is taken from the judgment of Phillimore J. :—

"The bankrupt Johnson, being then and now an unmarried man, and having then only just come of age, made on September 1, 1893, a settlement of certain property, of which settlement the appellants are the present trustees.

"The property settled was a share of residue passing under the grandfather's will; and the grandfather, when bequeathing legacies to his sons for their lives, had made such legacies determinable on bankruptcy, or upon the assignment or charge of the annual income.

"For some reason, into which it is not important to inquire, the settlement made by the bankrupt Johnson, instead of expressing the trust and limitations explicitly, stated them by way of reference to the grandfather's will. There is, however, no dispute what these trusts and limitations are, though they have to be gathered from the two instruments. The settlor assigned property to the trustees on trust to pay him the annual income until he was declared bankrupt, or should assign or charge in any way the annual income. Thereafter his rights were to cease, and the trustees were to have power to apply or not as they thought fit the income or any part for his personal maintenance and support, and were to apply the residue, if any, for the benefit of his children, if there were any, or to accumulate it and add it to the corpus, which corpus was ultimately to go to certain relations.

"In 1900 there was a first adjudication of bankruptcy. The trustee in that bankruptcy moved, under s. 47 of the Bankruptcy Act, 1883, to set aside the settlement, and it was set aside so far as was necessary to pay the bankrupt's debts provable in that bankruptcy. Thereupon, under an order made by consent, the trustees of the settlement raised a sufficient sum to pay the bankrupt's debts in full and the costs. The bankruptcy, however, does not seem to have been formally annulled.

"In 1902 there was a second bankruptcy. The trustee in that bankruptcy again applied to set aside the settlement; but this time he failed, the county court judge finding as a fact

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that at the time of making the settlement the bankrupt was able to pay all his debts without the aid of the property comprised in it.

"The trustee in bankruptcy then applied to have it adjudged and declared that the life estate of the bankrupt under the settlement vested in him, the said trustee, and that he was entitled to the income thereof with the arrears. He obtained an order in these terms, and this is the order now under appeal."

Leigh Clare, for the appellant. The order was wrong, and there was nothing on which it could operate. The effect of the first bankruptcy was to avoid the life interest of the bankrupt altogether, and to vest the settled property in the trustees of the settlement for the benefit of the persons entitled in remainder under the settlement.

A. H. Carrington, for the respondent. The first bankruptcy did not avoid the settlement, since the trustees of the settlement consented to clear off the debts of the bankrupt out of the settled fund, and the bankruptcy must, therefore, be treated as if it had been annulled: *Metcalfe* v. *Metcalfe*. (1)

Leigh Clare replied.

Cur. adv. vult.

Dec. 12. The judgment of the Court (Wright and Phillimore JJ.) was read by

PHILLIMORE J. [After stating the facts as above, the learned judge proceeded:—] An owner of property cannot by way of settlement or contract qualify his own interest in property by a condition determining or controlling it, in the event of his own bankruptcy, to the disappointment or delay of his creditors. This was decided in *Wilson* v. *Greenwood* (2), and the decision has been followed in a number of cases, many of which will be found enumerated in *Mackintosh* v. *Pogose*. (3)

But this rule applies only to a limitation upon bankruptcy, and to cases where but for this limitation the property or

(1) (1889) 43 Ch. D. 633. (2) (1818) 1 Swans. 471, 481; 18 R. R. 118.
(3) [1895] 1 Ch. 505.

income would have come to the assignee or trustee in bankruptcy, and then only so far as it would have thus come. Thus, in *In re Detmold*, *Detmold* v. *Detmold* (1), the husband settlor, with a similar clause, suffered an incumbrance of his income by the appointment of a receiver at the suit of a judgment creditor on July 19, 1888. In or about September of the same year he was adjudicated a bankrupt upon an act of bankruptcy committed on July 29. It was held that before the act of bankruptcy there had been a forfeiture by the husband owing to the appointment of a receiver; that the limitation over to the wife upon such forfeiture was good, inasmuch as it defeated a particular alienee, and was not a fraud on the bankrupt laws; that, therefore, the gift over had taken effect before the bankruptcy, the income had become vested in the wife, and there was nothing for the trustee in bankruptcy to take.

Following this authority, the judge in *In re Brewer's Settlement*, *Morton* v. *Blackmore* (2), stated as follows the point which he had to determine (3): "The question is whether the life interest had determined previously to bankruptcy." In that case it was held that what had been done previously to the bankruptcy did not amount to forfeiture or determination of the life interest, and, therefore, the trustee in bankruptcy took the life interest.

In the case before us, the trustee in the first bankruptcy, if he had failed in setting aside the settlement, would have succeeded in getting the bankrupt's life interest under it, because to allow the limitation over to take effect would have been, in the language of the cases, a "fraud upon the bankrupt laws" or a disposition of property forbidden by law. But though the alienation could not take effect so as to disappoint and delay the creditors in the first bankruptcy, it operated as against the settlor as a forfeiture. He lost all his rights to the residue left after paying those creditors. The income came under the control and discretion of the trustees. If the limitation over had been to a determined person (as to the

(1) (1889) 40 Ch. D. 585. (2) [1896] 2 Ch. 503.
(3) [1896] 2 Ch. at p. 506.

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JOHNSON JOHNSON, *In re.* MATTHEWS AND WILKINSON, *Ex parte.*

wife in *In re Detmold* (1)), she would have claimed a vested interest, which could only have been divested by impeaching the settlement—an impeachment which in this case has failed.

The case looks different because the trustees of the settlement have a discretionary power; but the law to be applied is the same.

The appeal must be allowed.

Appeal allowed.

Solicitor for appellant: *W. E. Dowson.*

Solicitor for respondent: *W. B. Glasier.*

A. P. P. K.

C. A.

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Dec. 8.

[IN THE COURT OF APPEAL.]

SPEAKE *v.* HUGHES.

Defamation—Slander—Special Damage—Remoteness of Damage.

Where an action of slander was brought in respect of a statement made by the defendant to the plaintiff's employers that the plaintiff had removed from premises, leaving rent due to his landlord, the plaintiff alleging that he had in consequence of that statement been dismissed from the service of his employers:—

Held, that the action would not lie, the damage alleged being too remote.

APPLICATION for judgment or a new trial in an action tried before the learned assessor of the Court of Passage at Liverpool with a jury.

The action was for slander.

The statement of claim stated, in substance, that the plaintiff was a barman in the employ of certain brewers at Liverpool, and was next in turn to be appointed manager of one of their public-houses; that the defendant falsely and maliciously by his agent, one Bishop, thereunto particularly directed and authorized, spoke and published to the plaintiff's employers the words following: "You have a barman in your employ, named Speake," meaning thereby the plaintiff, "who has removed from his landlord's house, leaving 2*l.* owing for a

(1) 40 Ch. D. 585.

month's rent, and I cannot get the money from him," meaning thereby that the plaintiff had fraudulently and clandestinely removed from the said house with intent to evade payment of the said rent altogether, and had evaded such payment; and that, in consequence of the said slander, the plaintiff's employers dismissed the plaintiff from their employment.

It appeared from answers to interrogatories administered to the defendant that the plaintiff had been tenant to the defendant of a house, and that the man Bishop was in the defendant's employ. Upon the opening of the case at the trial, the learned assessor held that the statement of claim did not disclose any cause of action, the words alleged to have been spoken not being capable of a defamatory meaning, and the damage being too remote. He therefore nonsuited the plaintiff. (1)

C. Y. C. Dawbarn, for the plaintiff. The learned assessor of the Passage Court was wrong in holding that there was no cause of action shewn by the statement of claim. It is submitted that the words alleged to have been spoken are capable of a defamatory meaning; and that they are actionable as having been spoken of the plaintiff in reference to his occupation; or, if not, as having been followed by special damage. They are capable of the meaning that the plaintiff had removed from a house, of which he was tenant, leaving rent unpaid, under circumstances which involved dishonesty, or at any rate pecuniary embarrassment on his part. It appears that he was employed in a position in which he would receive cash for his employers, and therefore one of trust, and that he was likely to be promoted to a still more responsible position. It cannot be said that it was not, under the circumstances, a reasonably probable result of an imputation of dishonest conduct, or pecuniary embarrassment, that he might

(1) It may be observed that it does not appear to have been suggested that any evidence could have been called of any special circumstances known to the defendant tending to shew that he contemplated the dismissal of the plaintiff as a probable consequence of the statement made by him. See Odgers on Libel and Slander, 3rd ed. chap. v. s. v. p. 168, and chap. xii. s. vi. p. 371.

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be dismissed from such an employment. The special damage cannot therefore be regarded as too remote in point of law. [He cited *Vicars* v. *Wilcocks* (1); *Lumby* v. *Allday* (2); *Knight* v. *Gibbs* (3); *Chamberlain* v. *Boyd*. (4)]

A. J. Ashton, for the defendant, was not called upon to argue.

COLLINS M.R. This is an appeal from a decision of the learned assessor of the Passage Court at Liverpool. The action is brought in respect of spoken words which, in any point of view, cannot, in my opinion, be actionable in the absence of special damage resulting from them. The words alleged to have been spoken were these: "You have a barman in your employ, named Speake, who has removed from his landlord's house, leaving 2*l*. owing for a month's rent, and I cannot get the money from him." The plaintiff alleges that special damage resulted from those words having been spoken by the defendant to a person, who, at the defendant's request, repeated them to the plaintiff's employers, the damage so alleged being that they thereupon dismissed the plaintiff from their service. It is a question of law whether such damage can, in point of law, be reasonably looked upon as a consequence of the words alleged to have been spoken by the defendant. The defendant might, I think, fairly be taken to have contemplated that, as a result of those words, the plaintiff's employers would exercise some pressure upon him to make him pay the rent owing to the defendant; but that, instead of doing that, the plaintiff's employers should, on the words being repeated to them, thereupon proceed to dismiss him, does not appear to me, in point of law, to be a natural consequence of the words spoken, or one which the defendant can reasonably be taken to have contemplated when he spoke them. That being so, I think the chain of causality between the words spoken and the alleged damage breaks down, and there is therefore no special damage upon which the plaintiff can rely in order to

(1) (1860) 8 East, 1; 9 R. R. 361.
(2) (1831) 1 C. & J. 301; 35 R. R. 715.
(3) (1834) 1 A. & E. 43; 40 R. R. 247.
(4) (1883) 11 Q. B. D. 407.

establish a cause of action. On these grounds I think the appeal fails.

MATHEW L.J. I agree. It cannot, I think, be contended that the words alleged to have been spoken in this case can be actionable per se: and the special damage alleged is not such as, in my opinion, can be regarded as a natural consequence of the words spoken. The defendant might reasonably be supposed to have contemplated, when he spoke the words, that the plaintiff's employers would remonstrate with him on the subject, but not that they would dismiss him from their service.

COZENS-HARDY L.J. concurred.

Appeal dismissed.

Solicitors for plaintiff: *Bower, Cotton & Bower, for W. H. Pride, Liverpool.*

Solicitors for defendant: *F. Venn & Co., for Monkhouse & Dixon, Liverpool.*

E. L.

1903
Dec. 8.

CAREY *v.* MAYOR, ALDERMEN, AND BURGESSES OF BEXHILL.

Local Government—Private Streets Works Act, 1892 (55 & 56 *Vict. c.* 57), *ss.* 5, 7—*Objections to proposed Works—Grounds—Not a Street within the Act — Highway repairable by Inhabitants at large — Evidence — Admissibility.*

By s. 7 of the Private Streets Works Act, 1892, the owner of premises liable to be charged with any part of the cost of executing works under the Act may by written notice to the urban authority object to the proposed works on the following, amongst other, grounds: (*a*) that an alleged street is not a street within the meaning of the Act; (*b*) that a street is a highway repairable by the inhabitants at large. By s. 5 the expression "street" in the Act means a street as defined by the Public Health Acts, and not being a highway repairable by the inhabitants at large:—

Held, that where the ground of objection was that the alleged street was not a street within the meaning of the Act, evidence was admissible to prove that the street was a highway repairable by the inhabitants at large.

CASE stated by justices upon the hearing of objections by the appellant under the Private Streets Works Act, 1892 (1), to a scheme of the respondents, the urban sanitary authority of the borough of Bexhill, for making up a portion of a certain street.

(1) The Private Streets Works Act, 1892 (55 & 56 Vict. c. 57). Sects. 2, 3 provide for the adoption of the Act by urban sanitary authorities.

By s. 5, "The expression 'street' means (unless the context otherwise requires) a street as defined by the Public Health Acts, and not being a highway repairable by the inhabitants at large."

Sect. 6 empowers the urban authority to resolve with respect to a street, or part of a street, to do certain private street works, if not already done to their satisfaction.

Sect. 7 empowers owners of premises liable to be charged with any part of the expenses of executing the works by written notice to object to the proposals of the urban authority upon the following, amongst other, grounds:

"(*a*) That an alleged street or part of a street is not or does not form part of a street within the meaning of this Act.

"(*b*) That a street or part of a street is (in whole or in part) a highway repairable by the inhabitants at large."

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The appellant was the owner of the freehold of two pieces of land having frontages to the street in question. Within the time provided by the Act the appellant gave notice to the respondents that he objected to the scheme. The following was one of the grounds of objection stated by the appellant in his notice of objections:—

"1. That the alleged part of a street does not form part of a street within the meaning of the Act."

At the hearing it was contended on behalf of the appellant that he was entitled to call evidence to prove that the street in question was a highway repairable by the inhabitants at large, because, although he had not given notice of objection under sub-s. (*b*) of s. 7 of the Act, he had given notice under sub-s. (*a*).

The justices refused to admit the evidence on the ground that the question whether the street was a highway repairable by the inhabitants at large must be specifically raised by a notice of objection under sub-s. (*b*), and that the notice given by the appellant under sub-s. (*a*) was not sufficient to enable the objector to raise the point. They also held that they had no power to amend the notice of objection. The questions for the opinion of the Court were whether the justices were right in excluding the evidence, and whether they had jurisdiction to amend the notice; and, if so, whether they were bound to do so in favour of the appellant.

J. R. Macoun, for the appellant. The justices were wrong in refusing to admit the evidence. An objection under sub-s. (*a*) of s. 7 necessarily includes the objection that the alleged street is a highway repairable by the inhabitants at large, for that is part of the definition of the expression "street" in the Act. Secondly, there was power under s. 8 to amend the notice or to adjourn the hearing in order that a fresh notice might be given.

Macmorran, K.C. (*C. A. M. Barlow* with him), for the respondents. There is no power to amend a notice of objection, because the jurisdiction of the justices only exists as to

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the notice actually given; nor, when the time for giving the notice has expired, is there power to adjourn the proceedings in order that a fresh notice of objection may be given. The intention of the Act, in requiring the grounds of objection to be specified, is that the local authority may know what case it has to meet and may prepare accordingly. Sub-s. (*a*) is intended to deal with a case where it is contended that the alleged street is not a street at all: *Wake* v. *Mayor of Sheffield* (1); but if the objection is that the street is a highway repairable by the inhabitants at large, then that question must be specifically raised under sub-s. (*b*); otherwise there was no reason for inserting that sub-section in the Act.

LORD ALVERSTONE C.J. It is unnecessary to decide the question as to the power of the justices to amend a notice of objection or to adjourn the proceedings in order that a fresh notice may be given, because in my opinion evidence that the street in question was a highway repairable by the inhabitants at large was admissible under the notice of objection which the appellant had given. The ground of objection was that specified in sub-s. (*a*) of s. 7, namely, that the alleged part of a street did not form part of a street within the meaning of the Act. By s. 5 the expression "street" is defined as meaning a street as defined by the Public Health Act, and not being a highway repairable by the inhabitants at large. I think that where a notice of objection is given under sub-s. (*a*) the objector is entitled to traverse every allegation that has to be proved in order to bring the alleged street within the definition, and I can see no ground for holding that an objector under sub-s. (*a*) is to be limited to disproving the first part only of the definition of a "street" and is not to be allowed to give evidence to shew that the alleged street does not comply with the latter part of the definition. It is true that this latter point could also be raised on notice of objection under sub-s. (*b*), and, to that extent, the two sub-sections no doubt overlap. I think, however, that the justices were wrong in excluding this

(1) (1883) 12 Q. B. D. 142.

evidence, and the case must go back in order that they may receive it.

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LAWRANCE and KENNEDY JJ. concurred.

Appeal allowed.
Case remitted to justices.

Solicitors for appellant: *Lovell, Son & Pitfield, for Willett, Bexhill.*

Solicitor for respondents: *F. G. Langham, Hastings.*

F. O. R.

HAYCOCKS, LIMITED *v.* MULHOLLAND.

1903

Nov. 23; *Dec.* 8.

Practice—Costs—Procedure under Order XIV.*—Judgment for* 20*l. and upwards but less than* 50*l.—Reference of Action to Master—Discretion to give Costs on High Court Scale—Order* XIV., *r.* 7*—County Courts Act,* 1888 (51 & 52 *Vict. c.* 43), *s.* 116.

Upon an application for judgment under Order XIV. the action was referred to a master under rule 7, and in the result he made an order, after the expiration of twenty-one days from service of the writ, that the plaintiff be at liberty to sign final judgment for a sum exceeding 20*l.* but less than 50*l.*, with costs of the action, which he fixed at a specific sum, and with the costs of the reference and award to be taxed on the High Court scale, and he certified that the action was fit to be brought in the High Court. On an appeal from this order to the judge at chambers:—

Held, that, as there had been no order extending the time—twenty-one days from the service of the writ—within which by the proviso to s. 116 of the County Courts Act, 1888, a plaintiff who obtains judgment under Order XIV. for upwards of 20*l.* is entitled to costs on the High Court scale, the plaintiff was only entitled to costs of the action on the county court scale; but that, with respect to costs of the reference and award, the master must be deemed to be an arbitrator with the same power as an ordinary arbitrator has of awarding and certifying for costs, and therefore that his order in this respect was right.

Per Phillimore J.: The power to extend the time given by the proviso to s. 116 of the County Courts Act, 1888, is given only to a judge of the High Court.

APPEAL from the order of a master to Phillimore J. at chambers.

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J. D. Crawford, for the plaintiffs, and *H. Nield*, for the defendant, were counsel on the hearing of the appeal.

Cur. adv. vult.

Dec. 8. The following judgment, from which the facts of the case and the questions raised will be sufficiently gathered, was read in Court by

PHILLIMORE J. In this case the summons came before me in chambers, and was argued by counsel on November 23 last. I took time to consider what my order should be, and, as the matter involves some questions of importance with regard to the procedure in small debt cases, I thought it well to have information from the masters of the King's Bench Division and to give my judgment in Court.

The action is brought on a tradesman's bill for a small balance of account representing items of dispute between the tradesman and his employer in a bill of considerable amount. The summons taken out under Order XIV. was heard before a master on October 29 last. No order was drawn up upon this summons, but the master's note upon it is as follows: "Adjourned for trial before master." Thereafter the case was tried before the same master; witnesses were examined, and the master finally decided in favour of the plaintiffs for 23*l.* 15*s.*, which, if I recollect rightly, was either the whole, or nearly the whole, of the plaintiffs' claim. The master proceeded to embody his judgment in the following terms: "It is ordered that the plaintiffs be at liberty to sign judgment for 23*l.* 15*s.* with 7*l.* costs of action, and also with costs of the reference to the master and his award, such costs to be taxed by the taxing master on the High Court scale with the certificate that the action was a fit action to be brought in the High Court."

This is the order under appeal; and the application to me is that I should vary it by directing that the plaintiffs should sign judgment with costs on the county court scale. In the first place it is, I think, inconvenient that no order of reference was drawn up. The reference to the master can only be made by consent of the parties (Order XIV., r. 7). In the case before

me there was some uncertainty as to whether such consent was given. I think that consent was sufficiently expressed; but there ought to be no doubt in the matter. The master should explain to the parties that he can only make such an order by consent, and this equally so whether it be for a town or country case. Moreover, the word "adjournment" is not correct. There should be an order drawn up, and it should recite that it was made by consent. In the second place, I do not think that the master has power to extend the twenty-one days allowed for obtaining judgment under Order XIV., with High Court costs. The statutory power under s. 116 of the County Courts Act, 1888, is given only to a judge: see *Cox* v. *Hill*. (1) I find the masters are entirely in accord as to this; and it is right to say that in this case the master has not purported to extend the time. This being so, and judgment not having been got within the twenty-one days, costs of the action, as distinct from the costs of the reference, must be on the county court scale. Here the master has given a lump sum for these costs, acting under Order LXV., r. 27, sub-r. 38, and the scale given under the practice rules for High Court costs under Order XIV., where the sum recovered is over 20*l.* and under 50*l.* I am far from saying that the master was wrong in giving a fixed sum. On the contrary, it seems to me the best thing to do, and it would be absurd to make out a hypothetical county court bill of costs. But, as the scale is to be county court and not High Court, I think (as the masters point out) special regard should be paid to Order LXV., r. 12; and it seems to me that the fixed sum should be less than the High Court fixed sum. I have no reason to suppose that the master was professing to arrive at probable county court costs; and though I was told that the difference would not be great, it was admitted that county court costs would be rather less. I propose in this case to save the expense of a further inquiry and reduce this 7*l.* to 5*l.* 10*s.* The particular figure is not to be a precedent, and I should hope that the masters may arrive at some fixed sum for future occasion.

(1) (1892) 67 L. T. 26.

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Phillimore J.

Then, as to the costs of the reference. Treating this, as I must, as a reference by consent, I think the case is governed by the decision of the Court of Appeal in *Street* v. *Strect.* (1) The master is to be deemed an arbitrator, and he has the same discretion as to costs, including the power to certify for High Court costs, as an arbitrator has. The judgment, therefore, in this respect must stand.

I have made a slight variation in favour of the appellant, and I think, as I have pointed out, that he may have been somewhat prejudiced by the informal mode in which the case was remitted to the master. In the main, however, the respondents hold what they have got. There should be no costs of the appeal.

Order accordingly.

Solicitors for plaintiffs: *J. J. Edwards & Co.*
Solicitor for defendants: *J. Moverley Sharp.*

(1) [1900] 2 Q. B. 57.

W. A.

[IN THE COURT OF APPEAL.]

C. A. 1903 Dec. 10.

BELL (SURVEYOR OF TAXES), APPELLANT *v.* NATIONAL PROVINCIAL BANK OF ENGLAND, LIMITED, RESPONDENTS.

Revenue—Income Tax—Sched. D—Bank—Purchase of Business of another Bank—Establishment of Branch—Succession to Business—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Sched. D, First and Second Cases, Rule* 4.

The respondents, a bank with a large capital, whose head office was in London, and having numerous branches in England and Wales, purchased in 1899 the business and premises and other assets of the County of Stafford Bank, which had a comparatively small capital, and carried on business only at Wolverhampton. The respondents then for the first time opened a branch at that place upon the premises so purchased, and there carried on business with the manager and staff previously employed by the County of Stafford Bank. The profits and expenses of the business so carried on at Wolverhampton by the respondents were merged in those of their concern as a whole, and there were no means of ascertaining whether there were any profits, or the proportion of increase or decrease, if any, in the profits of the respondents' bank, which had arisen from the business purchased as aforesaid. In the three years respectively subsequent to 1899, the respondents, in computing the average of their profits under the First Rule of the First Case in s. 100, Sched. D, of the Income Tax Act, 1842, did not include any profits earned by the County of Stafford Bank. Additional assessments were made upon them so as to include such profits, on the ground that there had been a succession by them to the business of the County of Stafford Bank within the meaning of the Fourth Rule applicable to the First and Second Cases in Sched. D:—

Held (reversing the judgment of Ridley J.), that there had been such a succession, and therefore the additional assessments were rightly made.

APPEAL from the judgment of Ridley J. upon a case stated under 43 & 44 Vict. c. 19, s. 59, by the Commissioners for the general purposes of the Income Tax Acts. (1)

The facts set out in the case were as follows:—

At a meeting of the Commissioners for the general purposes of the Income Tax Acts and for executing the Acts relating to the inhabited house duties for the City of London, the National Provincial Bank of England, Limited, appealed against an

(1) [1903] 2 K. B. 249.

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assessment of 4818*l.* beyond their assessment on their own return of 228,493*l.* for the year ending April 5, 1900, against an assessment of 3218*l.* beyond their assessment on their own return of 299,768*l.* for the year ending April 5, 1901, and against an assessment of 1634*l.* beyond their assessment on their own return of 300,253*l.* for the year ending April 5, 1902, under Sched. D to the Act 16 & 17 Vict. c. 34, in the following circumstances: The National Provincial Bank of England, Limited (hereinafter called the respondents), which was established in the year 1833, and was subsequently registered under the Companies Acts with a nominal authorized capital of 15,900,000*l.*, on which 3,000,000*l.* had been paid, had since its foundation transacted banking business at the head office in Bishopsgate Street, in the City of London, and at a large number of branch establishments in London and various parts of England and Wales, such branch establishments now numbering 199. The County of Stafford Bank, Limited, was established in the year 1836 under the name of the Bilston District Banking Company, with a deed of settlement. In 1873 the company was registered under the Companies Act, 1862, as a company with unlimited liability, and the name of the company was changed to that of the County of Stafford Bank. In 1882 the company was incorporated as a company with limited liability under the name of the County of Stafford Bank, Limited, the registered capital being 800,000*l.*, divided into 20,000 shares of 40*l.* each. The head office and banking house of the company was at Wolverhampton, and under the regulations registered as the articles of association the business of the company was to be carried on there, and at such other places as the board might from time to time appoint. The company was also empowered to establish such branch banks, agencies, and local boards in the United Kingdom as the directors thought proper. As a matter of fact, however, the business was only carried on at Wolverhampton, and the powers conferred on the company under these regulations of establishing other business branch banks, agencies, and local boards were not exercised.

By agreements made respectively in February, 1899, and

March, 1899, the whole of the business of the County of Stafford Bank, Limited, which had carried on business for some sixty-two years previously on the same premises and without any branches, its business premises, furniture, and fixtures, and such of its assets and liabilities as were and are provided by the agreements and shewn in the balance-sheet annexed to the latter of the said agreements, was and were, as from the close of business on December 31, 1898, purchased by the respondents for the sum of 225,000*l.* under and upon the terms of the agreements. The business of the County of Stafford Bank was carried on as usual, but for the benefit and at the expense of the respondents, until the close of the business at 4 P.M. on March 5, 1899, when the premises were closed. On the following morning, namely, March 6, the same premises were opened as their Wolverhampton branch by the respondents, who had never previously had any branch, or carried on any business, at Wolverhampton. The manager and the whole of the former staff were taken over by, and had, subject to necessary and ordinary changes, since continued to remain there in the employ of the respondents. Business had since been carried on by the respondents at the same premises. None of the books of the County of Stafford Bank, Limited, were taken over or continued in use by the respondents, except that the ledgers, being found to be in the same form as those used by the respondents, were continued in use by them to the end of the current year. In such of the pass-books as were continued in use a notice was inserted by means of a rubber stamp to the effect that as from January 1, 1899, the account was with the respondents, but all new cheque-books and pass-books were issued in the name of the respondents. As provided by the latter of the said agreements, the County of Stafford Bank was not dissolved until six months after the date thereof, and the liquidators did not make up their final account or distribute the purchase-money until a considerable period had elapsed.

From December 31, 1898, the profits, if any, earned at and by the respondents' Wolverhampton branch merged in and formed part of the general profits of the respondents without any distinction as to source or origin of profit, and there were

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no means for ascertaining whether there were any profits, or the proportion of increase or decrease, if any, in the profits of the bank, which had arisen from the business, &c., so purchased as aforesaid. The ultimate profits divisible among the shareholders of the respondents were the result of the trading of the company as a whole, including the head office and all the branches, irrespective of the profit and loss arising from the business done at the head office or any particular branch. At and from the head office of the respondent company the general affairs of the company were transacted, and the working of the branches was regulated and supervised by the board of directors and general manager through various departments. All profits were received and dealt with by the head office. There were many classes of expenditure which were not and could not be definitely allocated in any way, such as general management and departmental and establishment expenses which could not be definitely attributed to any particular branch.

The general assessments of the respondents for the years ending April 5, 1901, and April 5, 1902, included some portion of the profits made by their Wolverhampton branch, if any were made, namely, the assessment for the year ending April 5, 1901, the profits on average for the preceding year 1899, and the assessment for the year ending April 5, 1902, the profits on average for the preceding years 1899 and 1900; but, as the accounts were merged in the general accounts of the respondents' bank, it was impossible to differentiate between the profits made by the Wolverhampton branch of the respondents and the general profits of such bank from the time the County of Stafford Bank was taken over. There were no means or accounts which would enable the respondents to make a return under the Income Tax Acts of the profits of their Wolverhampton branch (if any), or apply for the benefit of s. 133 of the 5 & 6 Vict. c. 35, in respect to such profits if less than the estimate. Profits were made by the County of Stafford Bank from the business at Wolverhampton for each of the three years ending December 31, 1896, 1897, and 1898 respectively, when the accounts were made up as follows: 1896, 4801*l.*; 1897, 4750*l.*; 1898, 4904*l.*; and the assessments of 4818*l.*,

3218*l.*, and 1634*l.* respectively for the years ending April 5, 1900, April 5, 1901, and April 5, 1902, appealed against were assumed profits made by the respondents, based on an estimate, for the first year on the average of the profits of the County of Stafford Bank of the three preceding years—namely, 1896, 1897, and 1898—after the usual allowances for dividends, rents, &c., on which income tax had been paid by way of deduction; based for the second of the said years on one-third of the profits of the years 1897 and 1898; and based for the third of the said years on one-third of the profits of the year 1898. An assessment was made on the County of Stafford Bank, Limited, for the year ending April 5, 1899, based on the average profits of the three preceding years ending December 31, 1897, and the duty was paid by the said company. There was no assessment for any one of the years ending April 5, 1900, April 5, 1901, or April 5, 1902, on the County of Stafford Bank, Limited.

Assessments on their own returns had also been made for the years ending April 5, 1900, April 5, 1901, and April 5, 1902, respectively, on the respondents at their head office in London, on amounts based on the average of the profits of their whole business for the three years ending respectively on December 31, 1898, December 31, 1899, and December 31, 1900, as shewn by the published accounts and balance-sheets for each period of three years respectively; and the duty on such assessments was duly paid by the respondents.

The respondents duly appealed to the Commissioners of Income Tax for the City of London as above mentioned.

On the hearing of the appeals the surveyor of taxes contended that the respondents were liable to the additional assessments in order to cover such estimated profits, and further contended that there was a succession on the part of the respondents to the business of the County of Stafford Bank, Limited, according to the terms of the Fourth Rule of the First and Second Cases, Sched. D, s. 100, of 5 & 6 Vict. c. 35 (1),

(1) Fourth Rule applying to First and Second Cases, Sched. D, s. 100, of 5 & 6 Vict. c. 35: "If amongst any persons engaged in any trade, manufacture, adventure, or concern, or in any profession, in partnership together, any change shall take place in such partnership, either by death, or

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and that, consequently, the respondents should be assessed to include the estimated profits of the business purchased from the County of Stafford Bank, Limited, estimated upon an average of the profits of the said periods of three years respectively of the County of Stafford Bank, Limited.

The respondents contended that the profits, if any, of the business carried on at Wolverhampton during the period covered by such additional assessments could not be made, or included in, the basis of any assessment against the respondents for that period, which was by the Act limited to the years 1896, 1897, and 1898, during none of which did the respondents carry on any business at Wolverhampton; that such profits, if any, were merged in the general profits of the respondents, and were liable to be extinguished or diminished by reason of losses elsewhere or general expenses; and in any event would, in due course, form part of the basis of assessment. Further, that, if the additional assessment was to be allowed, the respondents would be doubly assessed on such portion of their profits, if any, as arose from the business purchased from the County of Stafford Bank. Further, in reply to the contention of the surveyor, they contended that the acquirement by purchase of the business of the County of Stafford Bank was not a succession or such a succession as was contemplated by the Income Tax Acts.

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dissolution of partnership as to all or any of the partners, or by admitting any other partner therein, before the time of making the assessment, or within the period for which the assessment ought to be made under this Act, or if any person shall have succeeded to any trade, manufacture, adventure, or concern, or any profession, within such respective periods as aforesaid, the duty payable in respect of such partnership, or any of such partners, or any person succeeding to such profession, trade, manufacture, adventure, or concern, shall be computed and ascertained according to the profits and gains of such business derived during the respective periods herein mentioned, notwithstanding such change therein or succession to such business as aforesaid, unless such partners, or such person succeeding to such business as aforesaid, shall prove, to the satisfaction of the respective Commissioners, that the profits and gains of such business have fallen short or will fall short from some specific cause, to be alleged to them, since such change or succession took place or by reason thereof."

The Commissioners were of opinion that there was no succession within the meaning of the Fourth Rule, also that the business when purchased was not sufficiently, generally or separately, identified after merger in the respondents' business to render the profits, if any, properly subject to separate assessment, and that the respondents were or would be charged with a fair proportion of the profits, and were not liable to be additionally assessed over and above the ordinary assessments on the profits of the National Provincial Bank, and they discharged the assessments accordingly. From this decision the surveyor of taxes appealed.

Ridley J. gave judgment for the respondents. (1)

Sir R. B. Finlay, A.-G., and *Sir E. Carson, S.-G.* (*Rowlatt* with them), for the Crown. It is clear upon the facts stated in the case that there was, in substance and in fact, a succession by the respondents to the business of the County of Stafford Bank; and, that being so, the case comes within the Fourth Rule applicable to the First and Second Cases under Sched. D of s. 100 of the Income Tax Act, 1842. It can make no difference in point of principle that the business succeeded to is carried on afterwards by the successors in conjunction with another business of the same kind, belonging to them, which previously existed. It cannot be that, because this is so, no income tax is to be assessed on the average profits of the business succeeded to during the three years preceding the succession. Taking the year 1900 for example, the respondents' contention is, in effect, that the assessment upon them for income tax is to be based only upon the average profits of their business during the three years prior to the year 1899, excluding the profits during those years of the business of the County of Stafford Bank, which was not then their business; the effect of which would be that no income tax would be paid on those profits by any one. It would possibly be arguable that, if a business were purchased with the object of discontinuing it, and so increasing the profits of the purchaser's business, and it were discontinued, there would

(1) [1903] 2 K. B. 249.

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be no succession within the Fourth Rule, but this is not a case of that kind. The respondents did in fact carry on the old business. If a new company were formed to take over, and took over, two existing businesses, it could not be contended that they did not succeed to both businesses within the meaning of the Fourth Rule. There can be no difference in principle between that case and a case where a company already carrying on a business takes over another similar business. The case of *Ferguson* v. *Aikin* (1) has not the effect attributed to it by the learned judge in the Court below. That was a case in which a company had carried on business as whisky blenders, wine merchants, and exporters, and had an interest in a distillery which they did not work. A new company having been formed, which took over the business, and began to work the distillery, the Commissioners decided that the business of that company was a new business as a matter of fact, and the Court declined to go behind that decision. There is nothing in that decision which affects the present case. What was said in that case strongly tends to negative the view taken by the learned judge, that, besides the two alternative views, namely, that the business carried on by the respondents at Wolverhampton is new or that it is an old one succeeded to, there is a third alternative, namely, that the business of the respondents is an old one enlarged by the acquisition of that of the County of Stafford Bank, but still the old business. In *Prescott, Dimsdale & Co.* v. *Bank of England* (2) the question was whether certain banks, whose businesses had been amalgamated in a new company, could be said to be still carrying on business after the amalgamation for the purposes of s. 23 of the Bank of England Charter Act, 1844. That was obviously quite a different question from that raised here.

[They also cited *Ryhope Coal Co.* v. *Foyer*. (3)]

Danckwerts, K.C., and *Paget, K.C.*, for the respondents. The respondents are not liable to the assessments against which they have appealed. The question involved is really

(1) (1898) 4 Tax Cases, 36. (2) [1894] 1 Q. B. 351.
(3) (1881) 7 Q. B. D. 485.

one of fact, upon which there is no appeal from the decision of the Commissioners. The assessment under the First Case of Sched. D is in respect of a business carried on by the person to be charged; it is, however, not on any actual profit made by him during the year of assessment, but upon a hypothetical statutory income, estimated under the First Rule with reference to the average profits of the business carried on by him during the three preceding years. It is a fallacy to look at the case as if the tax were on actual profits of the year of assessment, or as if there were any question of the respondents' escaping a tax on actual profits made by them in that year. The contention for the Crown assumes that some one must pay income tax upon the average profits of the County of Stafford Bank for the three years before 1899. But suppose that bank had, instead of selling its business, merely discontinued it. If, instead of starting a new branch, the respondents had given up an old one, still the profits of their business must have been computed on the average of the three preceding years; and in that case the result would have been in favour of the Crown. The converse must hold good against them. The respondents have duly made their return, and been assessed at their head office in due course in respect of the profits of their business in the years in question, upon an average calculated in accordance with the First Rule; and they cannot be assessed again in respect of the business of the County of Stafford Bank, which was not carried on by them, and of the profits of that bank, which were not earned by them. The additional assessments really involve double taxation. The respondents, having been already duly assessed at their head office in respect of the profits of their business as an entirety, cannot be again assessed in respect of the profits of the Wolverhampton branch of that business. There was no succession by them to the business of the County of Stafford Bank within the meaning of the Fourth Rule. The business of the County of Stafford Bank ceased to exist in 1899. It then lost its identity by merger in that of the National Provincial Bank as a whole. The business carried on at a branch of a bank is not a separate business, but merely part of the

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business of the bank as a whole: see *Prince* v. *Oriental Bank Corporation* (1); *London Bank of Mexico and South America* v. *Apthorpe* (2); *San Paulo (Brazilian) Ry. Co.* v. *Carter*. (3) The question whether a business carried on can be said to be identical with an old business carried on previously must depend upon a variety of circumstances, and may often be one of degree. If the businesses of two companies of about equal calibre were amalgamated into one, possibly it might be said under certain circumstances that the new company had succeeded to the business of each of them. But that would depend on the circumstances, and the question is essentially one of fact. That case would be very different from one in which a local bank with a small capital of about 800,000*l.* becomes merged in a bank with a capital of nearly sixteen millions having branches all over the kingdom. This case really stands on the footing that the respondents have merely opened a new branch at Wolverhampton, and it cannot correctly be said that the National Provincial Bank is now carrying on the business of the County of Stafford Bank. The authorities clearly shew that the question is one of fact: *Ferguson* v. *Aikin* (4); *Prescott, Dimsdale & Co.* v. *Bank of England*. (5) The provisions of the Fourth Rule were not intended to apply to a case of this kind. They were merely meant to meet difficulties which might arise in cases where, through some change of partners or other such change, it might be alleged that what was substantially the same business as before the change was a different business, and therefore the assessment could not be made on the average of the profits for the three preceding years.

Sir R. B. Finlay, A.-G., was not called on to reply.

COLLINS M.R. This is an appeal from a decision of Ridley J. on a question relating to income tax, which arose by reason of the respondents' having in 1899 acquired by purchase the business of the County of Stafford Bank. The

(1) (1878) 3 App. Cas. 325.
(2) [1891] 2 Q. B. 378.
(3) [1896] A. C. 31.
(4) 4 Tax Cases, 36.
(5) [1894] 1 Q. B. 351.

question was whether, for the purpose of assessment to income tax, the result of what had taken place was that there had been a succession to a business within the Fourth Rule of the Rules applicable to the First and Second Cases in Sched. D, s. 100, of the Income Tax Act, 1842, so as to make applicable the provisions of that Rule, defining how in cases within it the assessment to income tax is to be made.

The First Case of s. 100 is: "Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade, not contained in any other schedule of this Act." The First Rule applicable to that case provides that "the duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern upon a fair and just average of three years, ending on such day of the year immediately preceding the year of assessment on which the accounts of the said trade, manufacture, adventure, or concern shall have been usually made up, or on the 5th day of April preceding the year of assessment." By the Fourth Rule, applying to the First and Second Cases, "if amongst any persons engaged in any trade, manufacture, adventure, or concern, or in any profession, in partnership together, any change shall take place in such partnership, either by death or dissolution of partnership as to all or any of the partners, or by admitting any other partner therein, before the time of making the assessment, or within the period for which the assessment ought to be made under this Act, or if any person shall have succeeded to any trade, manufacture, adventure, or concern, or any profession, within such respective periods as aforesaid, the duty payable in respect of such partnership, or any of such partners, or any person succeeding to such profession, trade, manufacture, adventure, or concern, shall be computed and ascertained according to the profits and gains of such business derived during the respective periods herein mentioned, notwithstanding such change therein or succession to such business as aforesaid, unless such partners, or such person succeeding to such business as aforesaid, shall prove, to the satisfaction of the respective Commissioners, that the profits and gains of

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such business have fallen short, or will fall short, from some specific cause to be alleged to them, since such change or succession took place, or by reason thereof." Therefore, if there has been a succession by a person to any trade, manufacture, adventure, or concern within the Rule, the duty is to be assessed in the usual way upon the average of the three preceding years' profits of the business as prescribed by the First Rule applicable to the First Case.

The importance of the question which arises in this case upon the Fourth Rule is that, if there was a succession by the respondents to the business of the County of Stafford Bank within the meaning of the Rule, then they would be liable to be assessed upon the profits made in that business in the manner provided by the First Rule, namely, upon an average of the three preceding years; but, on the other hand, if there was no such succession, then they could not be so assessed, and the case must be dealt with as if the respondents had merely opened a new branch at Wolverhampton for the first time; with the result, as was contended, that they could treat the business of that branch merely as part of the business of the whole concern, i.e., the National Provincial Bank of England, and make their return upon the average of the profits of that business in the three preceding years; in which case, as, upon the hypothesis, no profits would have been made by the respondents at Wolverhampton in the three preceding years, the profits of the County of Stafford Bank in those years would not come into the calculation, and the total of the amount upon which the respondents would be assessable to income tax would of course be reduced as compared with what it would have been if the profits of the County of Stafford Bank during the three preceding years had been taken into consideration. The respondents have been assessed to income tax upon the returns made by them, and, as those returns did not include any profits made by the County of Stafford Bank in the three years previous to the acquisition of its business by the respondents, additional assessments were made upon them in reference to those profits. The question is whether there was a succession to a business within the Fourth Rule. If

there was, then the profits of the County of Stafford Bank during those three years must be taken into consideration in assessing income tax. If there was no such succession, then, whatever the result may be under any other Rule, that mode of assessment is inapplicable. The learned judge has arrived at the conclusion that there was no succession within the Fourth Rule in this case, and therefore the profits of the County of Stafford Bank during the three years preceding the acquisition of its business by the respondents could not be taken into account in assessing the respondents to income tax. I cannot agree with that conclusion. The words of the Fourth Rule appear to me quite plain. If the National Provincial Bank had not been in existence, and a new company had been formed for the purpose of taking over the business of the County of Stafford Bank, the case would have been directly within the terms of the Rule. In that case the new company would clearly "have succeeded to" the "trade, adventure, or concern" of the old. I do not see how it can make any difference that the person succeeding to a business had an existing business of his own of a similar kind. He none the less succeeds to an existing business. The case was put during the argument of a person carrying on a business, who might desire to annihilate a rival business, so as to carry on his own at a greater profit, and who might therefore buy up that business with a view to its extinction; but there was nothing of that kind in the present case. The respondents acquired by purchase the goodwill and assets of the County of Stafford Bank, and carried on its business in the same way as before, except of course that the accounts and profits of the business became merged in those of the National Provincial Bank. It does not appear to me that the Income Tax Commissioners have, as suggested, found as a fact that there was no succession in this case. What they find is that there was no succession within the meaning of the Fourth Rule. That does not appear to me to be a finding of fact, but rather one of law, namely, that upon the construction of the Rule, such a succession as appears upon the facts stated is not within it. This is not a mere case of a bank forming a new branch at a place

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where they had none before; in which case I agree, the identity of the existing bank not being altered, the new business would merely be part of its business, and there could be no question of taking into consideration any profits of the new business in preceding years. There is no analogy in my opinion between that case and the case in which an existing business is acquired by a company having a similar business, and carried on by them after being so acquired.

The respondents' counsel relied on the case of *Ferguson* v. *Aikin* (1), as shewing that the question whether there has been a succession to a business is one of fact. It may be that in many cases, or at any rate in some, it is a question of fact. But, as I have already said, I do not think the Income Tax Commissioners have treated the question in this case as such. I think that they have decided it, and stated it for us, as a question of law; and therefore, if we think their decision is wrong, we are entitled to decide accordingly. For the reasons which I have given I cannot agree with their decision. The fact that, in a somewhat exceptional case in Scotland, the Commissioners having found that there was no succession in point of fact, the Court thought they were bound by that finding, and declined to go behind it, does not appear to me to prevent us from giving effect to our view of the law in the present case. We were pressed with the case of *Prescott, Dimsdale & Co.* v. *Bank of England.* (2) But, when that case is looked at, the only point decided was that, where certain banks had been amalgamated into a new company, and their businesses were continued after the amalgamation by the new company, they must be held to have ceased to carry on business. There seems to me to be nothing whatever in that case which interferes with our decision in the present upon the construction of the Fourth Rule. For these reasons I think the appeal must be allowed.

MATHEW L.J. I am of the same opinion. It was suggested for the respondents that the result of a decision against them would be that they would be subjected to a double taxation. I

(1) 4 Tax Cases, 36.

(2) [1894] 1 Q. B. 351.

cannot accept that suggestion having regard to the terms of the special case. As I understand the case, the facts are these: The respondents claimed to be assessed upon the average profits of the business of the National Provincial Bank for the preceding three years, excluding any profits of the business of the County of Stafford Bank for those years. That claim was objected to, and additional assessments were therefore made based upon the profits of the business of the latter bank. The question now is whether those assessments were properly made. It is clear that they were, if the case comes within the Fourth Rule. I do not see how it is possible to put any other construction upon the facts of this case than that there was a succession within the meaning of that Rule. The respondents purchased the whole concern of the County of Stafford Bank, its premises, the goodwill of its business, and its assets; and they continued to carry on the business on the same premises and with the same staff and customers as before. It seems to me that such a case is within the terms of the Rule. A difficulty was raised on the ground that it is impossible now to ascertain what are the profits of the Wolverhampton business taken separately. There was no difficulty in ascertaining those profits while the County of Stafford Bank still continued to exist, and I cannot see why there need be any difficulty now. It does not follow that, because the respondents have chosen to treat that business as merged in their business as a whole in the manner stated in the case, that merger can prevent the respondents from being liable under the Fourth Rule to additional assessments. The question raised by the case appears to me to be whether there was, upon the facts as stated by the Commissioners, a succession to a business within the meaning of the Fourth Rule. That question is one of law. The Commissioners have held that there was not such a succession, but I am unable to agree with that conclusion.

COZENS-HARDY L.J. I agree; and I have very little to add. When one looks at the agreement made between the respondents and the County of Stafford Bank, one finds that the respondents purchased the whole of the business of the County

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of Stafford Bank, the freehold premises on which that business had previously been carried on for some sixty-two years, and the furniture, and fixtures; and it was stipulated that the respondents should take over the assets and liabilities of the vendor company as mentioned in the agreement, and that that company should be dissolved. Since the time of that purchase the respondents have been carrying on a business of the same character as was previously carried on by the County of Stafford Bank, on the same premises, and with the same staff of clerks, as before. It appears to me impossible to say that there was not a succession by the respondents to the business of the County of Stafford Bank, within the meaning of the Fourth Rule, unless we are to hold that the Rule only applies to cases where the successor was not, at the time of the succession, carrying on a business of the same kind as that succeeded to, or where that business is isolated and kept apart from any other similar business previously carried on by him. I cannot find any reason for so limiting the application of the Fourth Rule. I do not think that the respondents were any the less successors to the business of the County of Stafford Bank, because they already had a large business of their own, or because the profits made in the business at the Wolverhampton branch are transmitted to London, and go to swell the general profits of the respondent bank.

Appeal allowed.

Solicitors for the Crown: *Solicitor of Inland Revenue.*
Solicitors for respondents: *Wilde, Moore & Wigston.*

E. L.

[IN THE COURT OF APPEAL.]

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ATTORNEY-GENERAL *v.* MURRAY AND ANOTHER.

Revenue—Estate Duty—Policy of Life Insurance—Marriage Settlement—"Interest purchased or provided by Deceased"—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2, *sub-s.* 1 (*d*)—*Life Assurance Act*, 1774 (14 *Geo.* 3, *c.* 48).

By s. 1 of the Finance Act, 1894, estate duty is granted upon all property which passes on the death of a person dying after the commencement of the Act. By s. 2, "property passing on the death" is to be deemed to include (s. 2, sub-s. 1 (*d*)) "any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased."

A father effected a policy of insurance in his own name on the life of his son, then aged eleven, to commence at the age of twenty-one, upon which ten yearly premiums only were to be paid; the father, who had no insurable interest in his son's life, paid all the premiums. After the son had attained the age of twenty-one, the father, with the approbation of the son and the son's intended wife, assigned to the trustees of the son's marriage settlement the policy of insurance and all moneys assured or to become payable under it upon trust after the son's death to invest the insurance moneys and pay the income to the wife for life. After the death of the son (who survived his father) the insurance moneys were paid by the insurance company to the trustees, who invested them in accordance with the trusts of the settlement:—

Held, that, assuming that as between the father and the insurance company the policy was illegal and void under 14 Geo. 3, c. 48, for want of insurable interest, and that the insurance moneys were not legally recoverable, yet, the money having been in fact paid by the insurance company, the liability to estate duty was not affected by the illegality of the contract of insurance.

Worthington v. *Curtis*, (1875) 1 Ch. D. 419, followed.

Held also, that the expression "interest" in s. 2, sub-s. 1 (*d*), of the Finance Act, 1894, covers money paid under a policy of insurance on the life of the deceased.

Attorney-General v. *Robinson*, [1901] 2 I. R. 67, approved.

But *held*, further, that the sum paid under the insurance policy on the son's death was not an interest purchased or provided by the son in concert or by arrangement with his father within the meaning of s. 2, sub-s. 1 (*d*) of the Finance Act, 1894, and that on the death of the son estate duty was not payable in respect of that sum.

Judgment of Ridley J., [1903] 2 K. B. 64, reversed.

APPEAL from the judgment of Ridley J., reported [1903] 2 K. B. 64, upon an information by the Attorney-General claiming estate duty.

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On July 25, 1866, Sir Henry William Peek effected a policy for 10,000*l.* in his own name on the life of his son, Cuthbert Edgar Peek (who was then eleven years of age), to commence at the age of twenty-one years, with the Commercial Union Assurance Company. Ten premiums only of 357*l.* 18*s.* 4*d.* each were to be paid, the first on July 25, 1866, and the last on July 25, 1875, all of which Sir H. W. Peek duly paid. By the policy it was declared that the capital, stock, and funds of the company should be subject and liable to pay to the assured 10,000*l.* on proof of the death of C. E. Peek after attaining twenty-one years, and that the policy should entitle the holder to participate in profits; there was a proviso that the company under all their policies of insurance should be liable in the whole only to the extent of so much of their corporate assets as from time to time should be duly applicable for the satisfaction of their corporate liabilities, and with regard to the particular branch of their business—fire, life, or marine—in respect to which their policies might respectively relate.

In 1884 C. E. Peek was married to Augusta Louisa Brodrick, and separate settlements of the husband's fortune and wife's fortune were executed. By the husband's settlement, which was dated January 2, 1884, and to which the husband, the wife, Sir H. W. Peek, and certain trustees (of whom the defendants were the survivors) were parties, it was recited that Sir H. W. Peek was entitled to the above-mentioned policy of assurance on the life of C. E. Peek for an original sum of 10,000*l.*, amounting then with bonuses to about 12,000*l.*, and that it had been agreed that Sir H. W. Peek should assign the policy and the moneys assured by or to become payable thereunder to the trustees; it was then witnessed that in pursuance of the agreement and in consideration of the intended marriage Sir H. W. Peek, with the approbation of C. E. Peek and A. L. Brodrick, assigned to the trustees the policy and all other moneys assured or to become payable by or under the same. It was then declared (inter alia) that the trustees should upon receipt of the policy moneys invest them and pay the income to A. L. Brodrick

during widowhood (if she should survive her husband), with the usual trusts for the children or child or other issue of the intended marriage.

C. E. Peek (who had succeeded to the title on the death of his father in 1898) died on July 6, 1901, leaving his wife surviving. At his death there were large funds of the Commercial Union Assurance Company appropriated to the payment of life policies, and in part arising from accumulated profits. The company paid 14,196*l.* 17*s.* of their invested funds to the defendants, as trustees of the settlement, in respect of the policy and bonuses, and that sum was invested by the defendants and the income paid to Sir C. E. Peek's widow.

The Attorney-General, on behalf of the Crown, claimed that estate duty under the provisions of the Finance Act, 1894, s. 1, and s. 2, sub-s. 1 (*d*), both or either of them, became payable by the defendants on the sum of 14,196*l.* 17*s.* as property passing or deemed to pass on the death of Sir C. E. Peek.

The learned judge gave judgment in favour of the Crown. (1)

The defendants appealed.

Dec. 9. *Danckwerts, K.C.*, and *R. J. Parker*, for the defendants. The first contention of the defendants is that there was not in this case any "interest purchased or provided by the deceased" within the meaning of s. 2, sub-s. 1 (*d*), of the Finance Act, 1894. The policy was really provided by the father of the deceased, and was not purchased or provided by the deceased in any sense. It is essential, in order that clause (*d*) of the sub-section may apply, that the interest should be purchased or provided by the deceased, either alone, or in concert, or by arrangement with another person. A person cannot be said to provide an interest, either alone, or in concert, or by arrangement with another person, merely because he assents to the arrangement under which it is provided by some one else, any more than a person could be said to join in granting property because he assented to a grant made to himself. Clause (*d*) of the sub-section

(1) [1903] 2 K. B. 64.

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contemplates a case in which two persons join in purchasing or providing an interest, by some such arrangement as occurred in the case of *Attorney-General* v. *Ellis* (1), but its terms cannot be made applicable to a case like this, where the son merely acquiesced in the father's settling upon the trusts of the marriage settlement a policy provided by the father alone. In *Attorney-General* v. *Dobree* (2) and *Attorney-General* v. *Robinson* (3) the policy was provided by the deceased. The reasoning of the learned judge in the Court below really makes the expression "provided by the deceased in concert with any other person" equivalent to "provided by any other person in concert with the deceased." In that sense any property included in a settlement might be said to be provided by any person who was a party to the settlement, such as the wife or the trustees. The words "in concert or by arrangement with any other person" were only inserted to prevent the possibility of its being argued that the deceased did not provide the interest because he provided it jointly or in concert with somebody else. Secondly, the policy in this case was illegal, because the father, who effected it, had no insurable interest in the life of the son. Such a policy is not merely void, but is illegal, as being against the policy of the law, under the Life Assurance Act, 1774 (14 Geo. 3, c. 48). There was therefore really no interest provided by anybody, the payment made upon the death of the son by the insurance company being merely a voluntary payment. The policy gave no contractual rights against the funds of the company, and, when the marriage settlement was executed, no interest passed to the trustees, for there was no legal interest to pass. No doubt there is authority to shew that, where the policy moneys are paid under an invalid policy, all questions relating to the title to the money must be dealt with just as if the policy had been valid, and, therefore, where trustees receive the policy moneys under an invalid policy which has been settled, they must hold them on the trusts of the settlement: see *Worthington* v. *Curtis* (4); but that does not shew that in such a case any

(1) [1895] 2 Q. B. 466.
(2) [1900] 1 Q. B. 442.
(3) [1901] 2 I. R. 67.
(4) (1875) 1 Ch. D. 419.

interest can be deemed to pass on the death of the deceased, there being really no interest created by the policy. It can hardly lie in the mouth of counsel for the Crown to say that a policy which is illegal creates an interest for the purpose of estate duty.

[They cited on this point *Gedge* v. *Royal Exchange Assurance Corporation.* (1)]

Thirdly, policies of life insurance do not come within s. 2, sub-s. 1 (*d*), of the Finance Act, 1894. They come in certain cases within s. 2, sub-s. 1 (*c*), as being property which would have been the subject of account duty under s. 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889; but the policy in the present case would not come within that clause of the sub-section, because s. 11 of the Act of 1889 only applies where there is a "donee" of the policy, and assignees under a marriage settlement are not "donees." The word "interest" in clause (*d*) must be construed as meaning something in the nature of property analogous to an annuity, but a policy is not such an interest. The words of clause (*d*) are not appropriate to a life policy which is a mere contract to pay a sum of money upon a certain event in consideration of the payment of premiums: see *Dalby* v. *India and London Life Assurance Co.* (2) The policy creates a chose in action, a contingent debt, which exists from the time when the policy is made, and the words "to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased" are not at all appropriate to it. No interest passed in the policy upon the deceased's death. The whole beneficial interest in the contingent debt passed under the settlement on the marriage, and the wife had no greater beneficial interest in it by reason of the husband's death than she had as soon as the marriage took place. In *Attorney-General* v. *Dobree* (3) Channell J. treated clause (*d*) as applying to life policies; but that case is distinguishable, for there the policy was effected by the deceased in favour of his wife, and he paid

(1) [1900] 2 Q. B. 214. (2) (1854) 15 C. B. 365.
(3) [1900] 1 Q. B. 442.

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the premiums. The case fell within clause (*c*) of the sub-section, and therefore estate duty was payable by virtue of that clause, and it was really unnecessary to consider whether the case came within clause (*d*). Similar observations apply to *Attorney-General* v. *Robinson*. (1) The reasoning of Lord Halsbury L.C. and Lord Herschell in *Lord Advocate* v. *Fleming* (2) is strong to shew that no interest can be said in this case to have passed on the death of the deceased so as to make estate duty payable.

Sir R. B. Finlay, *A.-G.*, and *Vaughan Hawkins*, for the Crown. This policy was provided by the deceased in concert or by arrangement with his father within the meaning of clause (*d*) of s. 2, sub-s. 1, of the Finance Act, 1894. The correspondence prior to the settlement shews this to have been so. If the father had effected the policy, and assigned it to the son, and the son had then settled it, clearly the Crown would have been entitled to the duty claimed. What difference is there in substance between that arrangement and the present, in which the father had no reversionary interest in the policy? The ultimate trust was in favour of the son, and the transaction amounted to a gift to him. Under these circumstances, though the father provided the interest, the son was also providing it under the arrangement embodied in the settlement.

With regard to the second point, it is perfectly clear that, if the insurance company do not avail themselves of the invalidity of the policy as a defence, but pay the policy moneys, those moneys are subject to the same rights and incidents as if the policy had been valid: *Worthington* v. *Curtis*. (3) It is not a case of the Crown asserting the validity of an illegal policy, in order to secure the duty, as suggested, but of the subject seeking, notwithstanding receipt of the moneys under the policy, to set up its invalidity in order to escape payment of duty.

With regard to the third point, it is a fallacy to suggest that policies only come within clause (*c*) of the sub-section. They

(1) [1901] 2 I. R. 67.
(2) [1897] A. C. 145.
(3) 1 Ch. D. 419.

fall within the general scope of ss. 1 and 2, sub-s. 1 (*a*), of the Finance Act, 1894. Upon the facts in *Attorney-General* v. *Dobree* (1) it was doubtful whether the case came within clause (*c*) of the sub-section, and it was distinctly held that it came within clause (*d*). That case is really undistinguishable from the present, and it is contended that, for the reasons given in the judgment of Channell J. in that case, it is clear that the moneys paid under the policy in this case were property passing on the death of the deceased on which estate duty was payable. *Attorney-General* v. *Robinson* (2) is to the same effect.

Danckwerts, K.C., in reply.

Cur. adv. vult.

1903. Dec. 19. The judgment of the Court (Collins M.R., Mathew L.J., and Cozens-Hardy L.J.) was read by

COZENS-HARDY L.J. This is an appeal from a judgment of Ridley J., who has held that estate duty is payable under s. 2, sub-s. 1 (*d*), of the Finance Act, 1894, on the death of Sir Cuthbert Peek in respect of a policy for 10,000*l.* on his life settled by his marriage settlement. The material words of the statute are these: "Property passing on the death of the deceased shall be deemed to include the property following—that is to say: Any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased."

Three points were raised in support of the appeal. First, it is contended that no property passed on the death, because the policy was taken out by and in the name of Sir Henry Peek, the father of Sir Cuthbert, who had, as the office was informed at the time, no insurable interest in his son's life. The policy was therefore illegal and void under the statute 14 Geo. 3, c. 48, and any money paid by the office after Sir Cuthbert's death was a mere gratuity. In our opinion, this contention cannot prevail. The statute made the contract of insurance void as

(1) [1900] 1 Q. B. 442. (2) [1901] 2 I. R. 67.

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between the office and Sir Henry, but no further. If the office, though not bound so to do, in fact paid the money, the payment must be treated as made in respect of the policy, and all the same consequences must follow as if the statute had not been passed. The judgment of the Court of Appeal in *Worthington* v. *Curtis* (1) really concludes this point. The words of Mellish L.J. are clear and direct (2): "The statute is a defence for the insurance company only, if they choose to avail themselves of it. If they do not, the question who is entitled to the money must be determined as if the statute did not exist. The contract is only made void as between the company and the insurer." The Court could not have arrived at the decision in that case on any other view of the law.

Secondly, it is contended that a policy of insurance is not an interest within sub-s. 1 (*d*). We have not been able to appreciate this argument. A policy is plainly property within the scope of s. 2, and we can see no ground for excluding it from sub-s. 1 (*d*). We are content to adopt the reasoning of Palles C.B. in *Attorney-General* v. *Robinson* (3), and we do not think any good object would be attained by attempting to further elaborate it.

Thirdly, assuming that this particular policy is capable of being brought within sub-s. 1 (*d*), it is contended that it was not "purchased or provided by the deceased either by himself alone or in concert or by arrangement with any other person." Now it is clear that, apart from the statute of George III., the policy was the property of Sir Henry alone, and that Sir Cuthbert had no right to or interest in it. The marriage settlement is framed on this footing. Sir Henry "as settlor" assigns the policy to the trustees upon the usual trusts. He also brings into settlement stocks and securities of large amount as well as real estate. We can draw no distinction between the policy and this other property. Who "provided" this property? The answer must be the father and not the son. The son "provided" some other property of his own, including a policy on his own life in another office, which we only mention to

(1) 1 Ch. D. 419. (2) 1 Ch. D. at p. 424.
(3) [1901] 2 I. R. 67.

shew that it has not been overlooked, but he did not "provide" this property. We are not prepared to hold that on a marriage settlement everything brought into settlement on the husband's side by his father or other relatives can properly be said to be provided by the husband in concert or by arrangement with his father or other relatives. The Finance Act must, of course, be construed fairly, but it is for the Crown to establish that a particular case falls within the language used, and we think the attempt fails in the present case. It is perhaps worth noting that, if Sir Henry, instead of being father of Sir Cuthbert, had been his uncle or had stood in loco parentis, it is clear that succession duty would be payable under the settlement, as on a succession from him, it being a disposition by him as predecessor. That the policies should be "provided" by the son, so as to be liable to estate duty, and at the same time "disposed of" by the legal owner of the policy, so as to be liable to succession duty at a rate based on the relationship of the predecessor, would be a strange result. In our opinion estate duty is not payable in respect of this policy money, but succession duty at 1 per cent. will be payable on the death of Lady Peek, who is now entitled for life to the income arising from the investment of the policy money.

In the view which we take it is not necessary to consider the precise meaning of the words "in concert or by arrangement with any other person." Sect. 15, sub-s. 3, indicates one class of cases to which the words might apply, and we conceive they may apply to a case where a husband settles a policy on his own life, and provision is made in the settlement for paying future premiums by the trustees out of the income of the trust property. This is by no means an unusual provision, and other examples might be given. An attempt was made to bring the case within sub-s. 1 (*d*) by referring to a letter written by Sir Henry to the office with the proposal, in which he said: "I effect the insurance in my own name, but with a view to giving him a paid-up policy for marriage settlement or otherwise if after he shall have attained his majority his conduct is quite satisfactory to me." But this expression of intention was of no moment. The intention was never carried into effect. It

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gave the son no right or interest in the policy. It cannot alter or enlarge the rights of the Crown, which must depend upon the terms of the marriage settlement alone. The appeal must be allowed.

Appeal allowed.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitors for defendants: *Johnsons, Long & Co.*

A. M.

1903 *Dec.* 14.

THE KING *v.* GILLESPIE AND OTHERS.

Poor-rate—Tender of part of Rate—Obligation of Magistrate to issue Distress Warrant for whole.

A rate having been duly made in a parish, a ratepayer tendered to the overseers a portion of the sum that he was liable to pay in respect of the rate, but refused to pay the balance. The overseers refused to accept part payment of the rate, and preferred a complaint before the magistrate against the ratepayer for a refusal to pay the rate. At the hearing the ratepayer again tendered in court a portion of the sum due from him, which was again refused; whereupon the magistrate refused to issue a distress warrant for more than the amount of the balance:—

Held, that under the circumstances the magistrate was not bound to issue his distress warrant for the whole amount of the rate.

RULE for a mandamus to the stipendiary magistrate for West Ham to issue a distress warrant.

On April 28, 1903, a rate was duly made in the parish of West Ham to meet the expenses that would be incurred by the overseers of the poor for the parish before September 29.

Messrs. C. Boardman & Sons were occupiers of premises in the parish and were rated accordingly, and were liable to pay in respect of the said rate the sum of 441*l.* 8*s.* 9*d.* The said rate included the education rate. The members of the firm of C. Boardman & Sons, or some of them, were members of the local Passive Resistance League, an association formed for the purpose of enabling the members thereof to take joint action in resisting payment of so much of any rate as they deemed to be applicable to the maintenance and support of non-provided or sectarian schools in the parish of West Ham

under the Education Act, 1902. In pursuance of the objects of the said league the firm of C. Boardman & Sons claimed to deduct from the said sum of 441*l.* 8*s.* 9*d.* the sum of 25*l.* 8*s.* 9*d.*, being the amount which they alleged represented the part of the rate applicable to non-provided or sectarian schools under the said Act, and they tendered to the overseers the sum of 416*l.*, being the amount of the rate less the sum which they so claimed to deduct. The overseers declined to accept part payment of the rate, and a complaint was accordingly preferred before the magistrate charging that Messrs. C. Boardman & Sons, being rated in the sum of 441*l.* 8*s.* 9*d.*, had refused and neglected to pay the said sum. At the hearing of the complaint on July 22 a member of the firm of C. Boardman & Sons appeared and made another tender in court of the sum of 416*l.*, which the overseers again refused to accept. It was stated by the assistant overseer that he did not think he had ever refused part payment of a rate before. The overseers asked for a distress warrant for the whole amount of the rate, but the magistrate refused to issue his distress warrant for more than 25*l.* 8*s.* 9*d.*, the balance of the rate over and above the amount of the tender. It was stated by the magistrate that during the fourteen years that he had sat in the West Ham Police Court he had heard many thousand poor-rate summonses, and that it was a matter of very frequent occurrence for the overseers to ask him to issue distress warrants for less amounts than those for which the summonses were issued, payment on account having been accepted by the overseers in the interval. A rule having been obtained calling on the magistrate and Messrs. C. Boardman & Sons to shew cause why the magistrate should not issue his distress warrant for the sum of 441*l.* 8*s.* 9*d.*,

Robson, K.C., *Macmorran*, K.C., and *Artemus Jones* shewed cause. The procedure with respect to distress for rates is contained in the provisions of 12 & 13 Vict. c. 14. The forms of complaint and summons given in the schedule to that Act state that the defaulting ratepayer "being a person duly rated and assessed to the relief of the poor . . . . in the sum

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of . . . . hath not paid the same or any part thereof, but hath refused so to do." The Act therefore contemplates that before the magistrate can be called upon to issue his distress warrant for the whole amount of the rate he must have information that the ratepayer has refused to pay the rate "or any part thereof." Here the ratepayer has not so refused, but has offered to pay a substantial part of the rate. With respect to the question as to how far the duty of a magistrate on an application for a distress warrant for non-payment of rates is ministerial only, it is stated in Archbold's Poor Law, 15th ed. p. 1056, that the test is whether "the objection raised upon the application for a distress warrant is one that would be a ground of appeal against the rate." Here the ratepayer's objection is not one that comes within that category. Moreover, non-payment of rates is an offence, in respect of which the defaulting ratepayer is mulcted in costs varying in amount with the amount of the sum to be levied; and the ratepayer ought not to be compelled by the overseers to make his offence and consequent penalty greater than he intends it to be.

Danckwerts, K.C., E. Morten, and *Sturges,* in support of the rule. The rate of 441*l.* 8*s.* 9*d.* which Messrs. Boardman were liable to pay was one entire demand, and a tender of part of an entire demand is inoperative: *Dixon* v. *Clark* (1); *Searles* v. *Sadgrave.* (2) The only persons who had any right to determine whether a payment on account should be accepted were the overseers. It was not a question for the magistrate. A creditor is not bound to accept part payment on account, especially when the tender is accompanied by a statement that the debtor refuses to pay the residue. There being a widespread agreement in the borough not to pay any part of the rate attributable to non-provided schools, if in each case part payment were accepted by the overseers there would be a large number of very small sums to be levied by distress; and the costs of the distress would in many cases be altogether disproportionate to the amount to be levied—so much so that the magistrate might be induced to disallow the costs to the overseers.

(1) (1848) 5 C. B. 365. (2) (1855) 5 E. & B. 639.

Subject to proof of the rate having been legally made, and of its being one which the defaulting ratepayer is legally liable to pay, the magistrate in issuing a distress warrant acts ministerially. He has no discretion as to whether he will issue it or not. He does not for the purpose of hearing the application sit as a Court of summary jurisdiction: *Reg.* v. *Price.* (1) The money is not recoverable through any order of his; "the rate itself is the order": per Cockburn C.J. (2) He has no power to delay the execution of the warrant or attach any other condition to its issue: *Reg.* v. *Handsley.* (3) "The justices upon due application for a distress warrant are bound to grant it and place it at the disposition of the overseers. They themselves have nothing to do but to act ministerially as a kind of sheriff in the execution of the process." (4) The reason why justices are entitled to require proof of the legality of the rate is that if they issued a warrant upon an illegal rate they would be liable to an action notwithstanding the provisions of 11 & 12 Vict. c. 44: *Newbould* v. *Coltman.* (5)

In dealing with the costs of a distress warrant, the magistrate acts no doubt judicially. So also when in default of distress he exercises his jurisdiction to commit to prison. He is expressly given by the 12 & 13 Vict. c. 14 a discretion as to whether he will commit or not, and as to the period for which he will commit: see *In re Edgcome.* (6) But in all other respects in dealing with a distress warrant he acts ministerially.

Under 12 & 13 Vict. c. 14, s. 5, the summons is to be issued against any person for non-payment of any sum for which he is "so rated or assessed as aforesaid"—that is, the whole amount of the rate. The section does not require that the summons shall be in the form in the schedule; it only says that it "may be in the form," and adds, "or in any form to the like effect." It was not intended by the Act that a warrant should issue for a part of a rate. When we come to the form of warrant of distress in the schedule (Form C, 1), it will be seen that in the recital of the evidence given before the magistrate

(1) (1880) 5 Q. B. D. 300.
(2) 5 Q. B. D. at p. 301.
(3) (1881) 7 Q. B. D. 398.
(4) 7 Q. B. D. at p. 399.
(5) (1851) 6 Ex. 189.
(6) [1902] 2 K. B. 403.

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the language is, "it being now duly proved . . . . that an assessment . . . . was duly made . . . . and that the said A. B. is therein and thereby assessed at the sum of . . . . aforesaid, and that the said sum hath been duly demanded of the said A. B., but that he hath not paid, and hath refused and still refuses to pay the same," all reference to a refusal to pay "any part thereof" being dropped.

LORD ALVERSTONE C.J. I am of opinion that the rule must be discharged. I wish it to be distinctly understood that nothing I say in this case must be supposed to give any countenance to the refusal of persons to pay rates that are legally due. I think it necessary to say that, because sometimes it has been supposed that a judgment given in a case of this kind has given support to contentions with which it has nothing to do. The question which we have to decide is whether, when an application is made for a distress warrant under 12 & 13 Vict. c. 14, and the party summoned, who must be present in court, tenders there and then in court a part of the money claimed, the magistrate is bound to issue a distress warrant for the whole amount. I agree with a great deal of what Mr. Danckwerts has said. I agree that the overseers are entitled to say that they will not take less than the full amount. I also agree that in general the duties of a magistrate on such an application are ministerial. The decisions shew that where the rate has been legally made, and the magistrate is satisfied that the person summoned is the occupier and has not paid the rate, the grounds upon which he can refuse to issue a distress warrant are very limited. I do not think it necessary to go through those grounds or to give a complete catalogue of them, but I am not aware that there is anything to be found in any decision to justify the view that a magistrate must issue a distress warrant even if the ratepayer is prepared there and then to pay the whole amount, nor do I know of any authority which suggests that he must issue a distress warrant for the whole if the overseers are offered there and then in cash a part of the amount due. I think no one can read the 12 & 13 Vict. c. 14 without coming to the conclusion that the Legislature

contemplated process being issued to enforce payment of part of the rate as well as of the whole. It contemplates on the one hand that there may be an application for a warrant for less than the full amount, and it contemplates on the other that there may be an application for more than the full amount of the particular rate, because it orders the justices, in cases where applicable, to issue a distress warrant for the amount of the rate, and also of all arrears that may be due. It is perfectly true that the Act does not imperatively require the forms in the schedule to be followed, for it says in s. 8 that "forms to the same or the like effect" shall be sufficient in law; but still the wording of the forms in the schedule shews that it was intended that the Act might be put in force for the recovery of a part of the rate only. Mr. Danckwerts has urged upon us that the cases in which distress warrants have been issued for less than the full amounts are all cases in which they have been so issued at the request of the overseers. That is probably true, but I think that according to the principles of justice, seeing that the statute contemplates process going for a part of the rate, when the magistrate is satisfied that a part of the money claimed is to be had in court for the asking, and the process of the Court is only required to enforce payment of the balance, he has a right to refuse to issue his distress warrant for more than the balance. To hold otherwise would throw upon the recalcitrant ratepayer larger costs than is necessary, because the parties levying would be entitled to recover larger fees in respect of levying the larger amount.

LAWRANCE J. I entirely agree.

KENNEDY J. I am of the same opinion. I wish to associate myself in my judgment entirely with what my Lord has said with regard to treating this case simply on general grounds. The question is whether we are by this procedure in mandamus to compel a magistrate to issue a distress warrant in respect of the whole of a rate when on the hearing of the summons an actual tender of a large portion is made then and there in court before him. Primâ facie that would seem to

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Kennedy J.

be an unlikely course for the law to be compelled to sanction. Though it would involve no gain to the overseers, it would involve considerably greater cost to the ratepayer. And I can see nothing in any previous decisions which compels the Court to hold that the mandamus ought to go. A ratepayer must of course pay the rate as ordered by law, and a magistrate, before whom the ratepayer is brought for non-payment of the rate, in issuing a distress warrant acts ministerially, and not judicially, in this sense—that if it is a valid rate and the ratepayer is in visible occupation of the property rated, the magistrate cannot go into any question except that of the rate being due and unpaid. In that sense his office is ministerial. But then arises the question, Is the magistrate, while accepting the amount of the rate as the amount for which he must put in force his powers under the Act, bound to disregard the fact that the person sought to be charged with the full amount offers to the overseers in court before him a less sum of money in part payment. I know of no authority obliging me to come to such a conclusion, and it seems to me most unreasonable. To my mind, the cases cited by Mr. Danckwerts as to tender of a portion of an entire debt are beside the question, for no one suggests that any previous tender by the ratepayer of a part of the rate could better his position. The magistrate is not there to try the question whether there has been a valid tender or not of the whole or part. But here the man actually offers cash in part payment in court, and what the magistrate has to look at is what is the amount which is actually unpaid. It could hardly be contended that if the ratepayer, having previously to the hearing refused to pay the rate, were to tender the whole amount of the rate in court, the overseers would be entitled to refuse the money and insist upon the distress warrant being issued. No doubt it might be the magistrate's duty to order the ratepayer in such a case to pay the costs incurred up to that point; it is quite another thing to say that he is bound to inflict on him the heavier costs which the issue of the distress warrant would entail. While it is not the function of the magistrate to consider previous tenders, it seems to me

that it would not be right to compel him to issue his warrant for the whole amount of a rate when either the whole or a part of it is actually offered in court before him.

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Rule discharged.

Solicitors for overseers: *Hillearys.*

Solicitors for respondents: *Lloyd-George, Roberts & Co.*

J. F. C.

[CROWN CASE RESERVED.]

THE KING *v.* TURNER.

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Nov. 27.

Bankruptcy—Offences—Undischarged Bankrupt—Obtaining Credit—Limit of Punishment—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 31—*Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *ss.* 11, 13.

By the Bankruptcy Act, 1883, s. 31, "Where an undischarged bankrupt who has been adjudged bankrupt under this Act obtains credit to the extent of twenty pounds or upwards from any person, without informing such person that he is an undischarged bankrupt, he shall be guilty of a misdemeanour, and may be dealt with and punished as if he had been guilty of a misdemeanour under the Debtors Act, 1869, and the provisions of that Act shall apply to proceedings under this section."

Sect. 11 of the Debtors Act, 1869, declares certain offences committed by persons adjudged bankrupt to be misdemeanours punishable by a sentence not exceeding two years' imprisonment with or without hard labour. Sect. 13 declares that the offence of fraudulently obtaining credit and certain other offences shall be misdemeanours punishable with imprisonment not exceeding one year with or without hard labour:—

Held, that an offence under s. 31 of the Bankruptcy Act, 1883, was punishable with a maximum sentence of one year's imprisonment with or without hard labour.

CASE stated by the Common Serjeant of the City of London.

The defendant was tried and convicted on an indictment under s. 31 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), for obtaining credit exceeding 20*l.* without disclosing that he was an undischarged bankrupt. That section provides that a person committing such an offence may be punished as if guilty of a misdemeanour under the Debtors Act, 1869 (32 & 33 Vict. c. 62). Sect. 11 of that Act specifies a number of

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misdemeanours for which a person adjudged bankrupt is liable to be imprisoned with hard labour for two years. Sect. 13 specifies other misdemeanours for which any person is liable to be imprisoned with hard labour for one year. The learned judge sentenced the defendant to be imprisoned with hard labour for fifteen months, subject to the question whether he was liable to be punished as if guilty of a misdemeanour under s. 11 of the Debtors Act, 1869. If the defendant was only liable to be punished under s. 13, the sentence was to be reduced to twelve months' imprisonment with hard labour.

E. F. Lever, for the defendant. The effect of the legislation is to limit the maximum punishment for an offence against s. 31 of the Bankruptcy Act, 1883, to twelve months' imprisonment with hard labour. The provisions of the Debtors Act, 1869, which are to apply to the case are those of s. 13 rather than those of s. 11; s. 31 of the Act of 1883 is in effect an extension of s. 13 of the Act of 1869, and makes the offence of non-disclosure of the fact of being an undischarged bankrupt one of the offences dealt with by that section. Fraud is not a material ingredient of the offence created by s. 31 of the Bankruptcy Act: *Reg.* v. *Dyson* (1); but if s. 11 of the Debtors Act, which deals with the punishment of fraudulent debtors, applies to it, the offence will be punishable as though fraud were a necessary ingredient by a maximum sentence of two years' imprisonment with hard labour.

Guy Stephenson, for the prosecution. There was power to pass the sentence of fifteen months' hard labour. Sect. 11 of the Debtors Act deals with offences which are cognate to the offence created by s. 31 of the Bankruptcy Act; all the subsections deal with offences by persons who have been adjudged bankrupt, while the offences in s. 13 may be committed by any one, whether he has been adjudged bankrupt or not.

LORD ALVERSTONE C.J. The defendant was indicted for an offence under s. 31 of the Bankruptcy Act, 1883, the punishment for which is fixed in that section by reference

(1) [1894] 2 Q. B. 176.

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Lord Alverstone C.J.

to the punishment for misdemeanours under the Debtors Act, 1869. The sections of the latter Act which have been cited to us deal with the punishment for misdemeanours, and there is nothing on the face of s. 31 of the Bankruptcy Act to point out which of the sections is to apply, the words used being "misdemeanours dealt with by the Debtors Act, 1869." But, looking at the sections to which our attention has been drawn, I think that the lesser punishment is the proper one to inflict. If there were nothing to guide us, the ordinary rule would be that the lesser punishment should be imposed; but I think that upon examination the sections themselves afford a reasonably clear indication as to which is to apply of the sections to which reference is made. Sect. 11 of the Debtors Act, 1869, deals with offences committed by bankrupts during, or in relation to, the conduct of the bankruptcy; they are serious offences, and are visited with a more severe punishment. Sect. 13 deals with the case of any person, not merely a bankrupt, who, in incurring a debt or liability, obtains credit by means of false pretences or other fraud; s. 31 of the Bankruptcy Act deals with a class of offences which are made misdemeanours even in the absence of fraud—that is, non-disclosure when obtaining credit to the amount of 20*l.* of the fact of being an undischarged bankrupt, which need not necessarily be fraudulent; in all other respects the section is cognate to s. 13 of the Debtors Act. I think that the class of offence dealt with by s. 31 of the Bankruptcy Act is more analogous to the offences dealt with by s. 13 than to those dealt with by s. 11 of the Debtors Act; therefore, whatever principle of interpretation is to govern us, the defendant is only liable to the lesser punishment, and the sentence must be reduced to one of twelve months' imprisonment with hard labour.

WRIGHT J., KENNEDY J., DARLING J., and PHILLIMORE J. concurred.

Appeal allowed; sentence reduced.

Solicitor for the Crown: *Solicitor to the Treasury.*
Solicitor for defendant: *H. R. Newson.*

W. J. B.

[CROWN CASE RESERVED.]

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Nov. 27.

THE KING *v.* ROUSE AND ANOTHER.

Criminal Law—Evidence—Nature and Conduct of Defence—Evidence of Person Charged—Cross-examination as to Character—Criminal Evidence Act, 1898 (61 & 62 *Vict. c.* 36), *s.* 1, *sub-s.* (*f*), (*ii.*).

Upon the trial of an indictment for conspiring by false pretences to induce the prosecutor to sell a mare, the prosecutor gave evidence that one of the defendants had previously offered to buy the mare on credit. The defendant in question was called as a witness for the defence, and was asked in cross-examination, "Did you ask the prosecutor to sell you the mare in April, or has he invented all that?" To which he replied, "No, it is a lie, and he is a liar." Counsel for the prosecution was thereupon allowed to cross-examine the defendant as to previous convictions:—

Held, that the defendant's answer amounted only to an emphatic denial of the truth of the charge against him; that the nature or conduct of the defence was not such as to involve imputations on the character of the prosecutor within the meaning of s. 1, sub-s. (*f*), (ii.), of the Criminal Evidence Act, 1898, and that therefore the defendant was not liable to be cross-examined as to his previous character.

CASE stated by the chairman of the Suffolk Quarter Sessions.

The defendants were indicted for conspiring together with other persons unknown, by means of various false pretences, &c., to induce Thomas John Wright to sell to the defendant Daniel Burrell a certain mare. In the prosecutor's evidence he stated that in April, 1902, Rouse offered to buy the mare of him on credit for the sum of 19*l.* Rouse was called as a witness on his own behalf, and in his cross-examination was asked by counsel for the prosecution, "Did you ask the prosecutor to sell you the mare in April for 19*l.*, or has he invented all that?" Rouse replied, "No, it is a lie, and he is a liar." Counsel for the prosecution then proposed to ask him if he had not been in trouble before. Counsel for the defence objected that on the mere statement that the prosecutor was a liar evidence as to the character of the defendant was inadmissible, there being no other attack made on the prosecutor or his witnesses. The chairman admitted the evidence, and Rouse

replied that he had been convicted of being quarrelsome, that he had been before the magistrates for drunkenness, and had been fined 15*s.* or 1*l.* for breaking a window. The defendants were convicted and sentenced, Rouse to one month's imprisonment with hard labour, and Burrell to three months' imprisonment with hard labour, and were undergoing the sentences. The chairman made no allusion to Rouse's character in summing up the case, and did not consider that the answers which he gave as to his character had any effect upon the issue.

If the Court was of opinion that the evidence was improperly admitted, the conviction was to be quashed; if otherwise, it was to be affirmed. (1)

E. E. Wild, for Rouse. The question asked in cross-examination was not admissible; the previous answer of the defendant does not come within the proviso of s. 1, sub-s. (*f*), (ii.), of the Criminal Evidence Act, 1898, as to the nature or conduct of the defence as involving imputations on the character of the prosecutor. The defendant's answer was merely a rough and emphatic way of saying that the charge against him was false, and amounted only to a plea of not guilty in forcible language. The question to which it was an answer was itself in the nature of an invitation to call the prosecutor a liar, and such an answer to such a question cannot make an accused man liable to cross-examination as to his previous character. If the evidence was inadmissible, the Court will not sift it with the view of seeing whether the

(1) By 61 & 62 Vict. c. 36 (The Criminal Evidence Act, 1898), s. 1, every person charged with an offence is made a competent witness for the defence, provided "(*f*) a person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to shew that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless . . . . (ii.) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution."

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conviction can be supported without it: *Reg.* v. *Gibson* (1); *Reg.* v. *Saunders.* (2) [He also cited *Reg.* v. *Marshall.* (3)]

[He was stopped by the Court.]

A. W. F. Bagge, for Burrell, did not argue.

W. Stewart, for the prosecution. This was not an isolated answer; the whole of the history of the trial should be looked at, and the nature of the defence considered.

[LORD ALVERSTONE C.J. We cannot travel outside the facts found in the case.]

It is not possible to argue the case further upon that basis.

LORD ALVERSTONE C.J. Having regard to the statement that has been made to us by the counsel for the prosecution, I wish to make it perfectly clear that our decision proceeds upon the particular facts as stated in the case, and that we are not laying down any general rule. The real question which we decide is whether the answer which the defendant gave to the question put to him was sufficient to justify cross-examination as to his antecedents. The indictment was for conspiring to induce the prosecutor by false pretences to sell a mare to the defendant Rouse, and the prosecutor in the course of his evidence said that on a previous occasion Rouse had offered to buy the mare from him for 19*l.* Rouse was called as a witness for the defence, and was asked this question in cross-examination: "Did you ask the prosecutor to sell you the mare in April for 19*l.*, or has he invented all that?" If the expression "all that" referred to matters outside those with which the prosecution was dealing, different considerations might arise, for the answer, "No, it is a lie, and he is a liar," might then perhaps be construed as an attack upon the prosecutor's general character as regards truthfulness. But under the circumstances of the case, I think that the prosecution is in a dilemma; either the answer amounted to no more than a plea of not guilty put in forcible language such as would not be unnatural in a person in the defendant's rank in life, or it had nothing to do with the conduct of the defence. In my opinion, the

(1) (1887) 18 Q. B. D. 537. (2) [1899] 1 Q. B. 490.
(3) (1899) 63 J. P. 36.

answer given by the defendant was not sufficient to bring the case within s. 1, sub-s. (*f*), (ii.), of the Criminal Evidence Act, 1898; the defence itself, by the plea of not guilty, involves the allegation that the charge is not true, and this answer of the defendant was no more than a denial, emphatic in its terms, to the same effect. The convictions must, therefore, be quashed.

WRIGHT J. I am of the same opinion.

KENNEDY J. I am of the same opinion.

DARLING J. I agree. Merely to deny a fact alleged by the prosecution is not necessarily to make an attack on the character of the prosecutor or his witnesses. Such a denial is necessary and inevitable in every case where a prisoner goes into the witness-box, and is nothing more than a traverse of the truth of an allegation made against him; to add in cross-examination that the prosecutor is a liar is merely an emphatic mode of denial, and does not affect its essential quality.

PHILLIMORE J. I am entirely of the same opinion, and agree with the remarks that have been added by my brother Darling. In my judgment it would be very dangerous to allow cross-examination to character under circumstances such as those in the present case; it would then only be necessary to provoke a prisoner in the witness-box to go further than was necessary in his anxiety to make a good defence to the charge against him, and he would be liable to have his whole previous career inquired into in cross-examination. If a simple question as to a precise fact were answered by an assertion that it was an untruth which the prosecutor had invented, cross-examination as to previous misconduct might, though I do not say it would, be admissible. But to allow the prosecution to follow up such a question as was here asked by saying that the answer is an attack on the prosecutor's character, and asking leave to cross-examine the defendant as to misconduct, would be to destroy all safeguards for an unprejudiced trial on the particular charge.

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I wish also to make it clear that my judgment proceeds entirely on the particular facts stated in the case before us.

Convictions quashed.

Solicitors for prosecution: *White, Borrett & Co., for Westhorp, Cobbold & Ward, Ipswich.*

Solicitors for defence: *Dubois & Williams, for Chamberlin & Taylor, Lowestoft.*

W. J. B.

[CROWN CASE RESERVED.]

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Nov. 27.

THE KING *v.* WYATT.

Criminal Law—False Pretences—Fraud—Evidence of previous Acts of Fraud—Admissibility.

Upon an indictment for obtaining credit by means of fraud, it was proved that the defendant hired furnished apartments from the prosecutrix and occupied them for three days, when he left without paying for them or for the food supplied to him. Evidence was admitted that a short time previously to the particular transaction the defendant had gone to several houses and hired apartments and left without paying, and that he still owed the money when he went to the house of the prosecutrix:—

Held, that the evidence, being evidence of similar acts committed by the defendant at a period immediately preceding the commission of the alleged offence, was admissible as tending to establish a systematic course of conduct, and as negativing any accident or mistake or the existence of any reasonable or honest motive on his part.

CASE stated by the chairman of the Worcestershire Quarter Sessions.

The defendant, who was undefended, was tried upon an indictment containing two counts. The first count charged that on August 4, 1903, and on other days between that day and August 7, 1903, he did unlawfully, in incurring a certain debt and liability to one Rhoda Williams to the amount of 14*s.* 6*d.*, obtain credit to the amount of the said debt and liability from her under false pretences. The second count charged that he obtained the credit by means of fraud other than false pretences.

It was proved that the defendant came to Mrs. Williams' house and asked if she let apartments; she replied that she did; he asked if she could take him; she asked for how long; he replied for the night only, and she agreed to take him in. The defendant asked for tea, and had a chop, bread and butter, and cake; he had a bed and sitting-room. He stayed for three days, when he owed 14*s.* 6*d.*; and then, in consequence of something the landlady had heard, she took him the bill, which was made out for 4*s.* 9*d.* only, and asked for payment. The defendant asked if she wanted it then particularly, and she replied that she did, as she had information and had seen newspaper cuttings which led her to believe that he was the man who went about getting apartments and leaving without paying. The defendant after a time admitted that he was the man mentioned, and said that he had nothing then, but would go and try and get something; he said that his luggage was detained at the hotel. He went away and returned shortly, offered the landlady 1*s.*, and asked her to let him stay; she refused, and he asked for his things and left.

At the conclusion of the evidence of the prosecutrix the chairman stated that, while there was ample evidence of a debt having been incurred and credit obtained, he thought it very doubtful whether there was sufficient evidence to justify a jury in saying that the credit was obtained by fraud. Counsel for the prosecution then proposed to call the hotel-keeper and other witnesses to prove that the defendant had had apartments at their houses and had left owing money. The chairman said that he was very doubtful if such evidence was admissible, as it involved an inquiry into each of the different cases whether the defendant had in each been guilty of a criminal offence, namely, obtaining credit by fraud, as obtaining credit was not of itself an offence, and that this fact distinguished the case from those where evidence of different acts, such as passing false coin, could be given in evidence, and that to admit such evidence was in effect to try, not merely the case in the indictment, but also whether the defendant had been guilty of fraud in a number of other cases not charged in the indictment. He admitted the evidence, subject to the

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present case. Assuming the evidence to be admissible, it proved that the defendant had gone to several houses and left without paying, and that he still owed the money when he went to the house of the prosecutrix.

The chairman directed the jury that to convict the defendant they must be satisfied that he incurred a debt, that he obtained credit by means of fraud, and that, if they were satisfied that he went to the prosecutrix's house without any intention of paying for his accommodation, they would be legally justified in finding him guilty. The jury convicted the defendant, and he was sentenced to two months' imprisonment in the third division.

The question of law for the determination of the Court was whether the evidence of witnesses who proved that the defendant had taken apartments with them and left owing money was admissible.

Hon. R. W. Coventry, for the defendant. The evidence was not admissible. Substantially this was evidence as to the defendant's previous bad character, which is not admissible, with certain statutory and common law exceptions. There is no statutory exception which can apply to the present case, nor is the common law exception applicable which admits such evidence in order to negative a defence of accident or mistake, as where a man is charged with uttering a forged document.

[LORD ALVERSTONE C.J. Is not the case of *Reg.* v. *Francis* (1) against you?]

No; the evidence was admitted there in order to shew that the defendant was an expert, and therefore to negative any idea of accident or mistake. To negative accident similar evidence is admitted in cases of arson and poisoning, as in *Reg.* v. *Flannagan*. (2) But where there is no element of accident at all, such evidence is disallowed: *Reg.* v. *Holt* (3), which case is directly in point. If admissible at all, it can only be on the ground that it is evidence to rebut a defence which may be set up, and this view may derive some apparent

(1) (1874) L. R. 2 C. C. 128. (2) (1884) 15 Cox C. C. 403.
(3) (1860) 8 Cox C. C. 411.

force from the language of Lord Herschell in *Makin* v. *Attorney-General of New South Wales* (1); but that expression of opinion is not to be read as meaning that in every case such evidence is admissible to rebut any possible defence; it must be read in connection with the preceding words as to designed or accidental acts.

[KENNEDY J. Is not the evidence admissible to shew a systematic course of conduct on the part of the accused?]

No; nor in the case last cited was the evidence held admissible on that ground. It is true that in *Reg.* v. *Ollis* (2) Lord Russell of Killowen C.J. and Wright J. did formulate a rule as to the admissibility of evidence on the ground that it tended to establish a system, but no trace of such a rule is to be found in the judgments of the other judges; and in that case the evidence which was held admissible did in fact tend to rebut the idea of accident.

[WRIGHT J. How can you distinguish *Reg.* v. *Rhodes*? (3)]

In that case the evidence was admissible to shew that the business carried on by the defendant was not genuine at all, but was a bogus business.

J. R. V. Marchant, for the prosecution, was not called upon.

LORD ALVERSTONE C.J. I am of opinion that this appeal must be dismissed. The able arguments that have been addressed to us go to the weight rather than to the admissibility of the evidence, and without overruling several of the authorities which have been cited to us we cannot hold the evidence inadmissible. The point has been the subject of many judicial pronouncements. In *Makin* v. *Attorney-General for New South Wales* (4) Lord Herschell said: "It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the

(1) [1894] A. C. 57, at p. 65.
(2) [1900] 2 Q. B. 758.
(3) [1899] 1 Q. B. 77.
(4) [1894] A. C. 57, at p. 65.

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other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused." And in *Reg.* v. *Rhodes* (1) Lord Russell of Killowen C.J. said: "We are informed by counsel that both transactions were subsequent to the dealing with Bays in respect of which the prisoner was charged, and that one of the transactions took place as much as two months after that time. It seems to me quite clear that, if the transactions with Elston and Chambers had taken place before that with Bays and at a period not too remote, the evidence of Elston and Chambers would have been admissible against the prisoner." The charge in that case was one of false pretences, but the rule is not less strict in cases of fraud other than false pretences. The same learned judge also said in *Reg.* v. *Ollis* (2): "At this trial counsel for the prosecution pressed the recorder to admit evidence of the fraud practised on Ramsey, as relevant to the charges then before him, and as negativing any reasonable belief on the part of the accused that there was money at the bank to meet these other cheques or any of them." And in the same case Wright J. thus described the evidence, the admissibility of which was in question (3): "The evidence tended to shew that the conduct of the prisoner, in tendering drafts on a bank at which he had no living account, was not inadvertent or accidental, but was part of a systematic fraud, extending over a period immediately preceding and following the date of the offence charged." These cases are clearly instances of the application of the principle to which my brother Kennedy called attention during the argument, namely, that evidence of similar acts committed by the accused at a period immediately preceding the commission of the offence is admissible as evidence of a system practised by him. In the present case the prosecutrix

(1) [1899] 1 Q. B. 77, at p. 81. (2) [1900] 2 Q. B. 758, at p. 764.
(3) [1900] 2 Q. B. at p. 768.

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had actually taxed the defendant with being the person mentioned in the newspaper reports which are mentioned in the case, and he admitted it. The evidence objected to was clearly admissible as tending to establish a systematic course of conduct on the part of the accused, and as negativing any accident or mistake or the existence of any reasonable or honest motive. The conviction must be affirmed.

WRIGHT, KENNEDY, DARLING, and PHILLIMORE JJ. concurred.

Appeal dismissed.

Solicitors for defendant: *Blundell, Gordon & Co., for Thorneley, Worcester.*

Solicitors for prosecution: *Ellis, Munday & Clarke, for Lambert & Rogers, Malvern.*

W. J. B.

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Dec. 7, 9.

LONDON COUNTY COUNCIL *v.* PAYNE & CO.

Weights and Measures—Weighing Machine—Weight indicated exceeding Weight of Article sold—Acquiescence of Purchaser—"False or Unjust"—Weights and Measures Act, 1878 (41 & 42 *Vict.* c. 49), *s.* 25.

The respondents, who were wholesale tea merchants, were charged under s. 25 of the Weights and Measures Act, 1878, with using for trade two scales which were false or unjust. One of the scales (which were used for weighing tea) had a small metal disc affixed by wire to the arm of the scale on which the scoop for weighing the tea was placed, the disc being approximately equivalent in weight to the paper bag in which each quantity of tea was to be put; the effect was to make the quantity of tea required to turn the scale less by the weight of the metal disc than the weight on the opposite side of the scale. The second machine had, instead of a metal disc, a paper bag placed under the scoop in which the tea was placed for weighing; the effect was the same. After being weighed the tea was placed in paper bags. Tea was so weighed out only for retail dealers who requested to be supplied with it so packed, and who supplied the paper bags in which it was to be packed to the respondents; each of the bags had printed on it an intimation that the weight of the paper was included. Directions were given by the respondents to their servants not to use scales with a metal disc or paper bag attached for any customers other than such retail dealers:—

Held, that the scales, being kept in a condition in which they could not weigh accurately that which was put in them to be weighed, were "false or unjust" within the meaning of the section, notwithstanding the acquiescence of the purchasers in the mode of weighing.

CASE stated by a metropolitan police magistrate.

The respondents had been summoned to answer two informations laid against them on behalf of the appellants. The first charged that they used for trade a weighing instrument, to wit, a beam scale, which was false or unjust contrary to s. 25 of the Weights and Measures Act, 1878, in that the beam scale had attached to it a metal disc. The second information charged a similar offence in respect of another beam scale which had a paper bag placed under the goods scoop thereof. The informations were by consent heard together, and the following facts were proved or admitted at the hearing:—

The respondents carried on business as wholesale tea mer-

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chants. On November 24, 1902, an inspector of weights and measures visited their premises and went into a room where tea was being weighed, and found in that room two beam scales which were in use for weighing out tea. The first scale had a small metal disc affixed by wire to the arm of the scale on which the scoop for receiving the tea was placed, the effect being that the quantity of tea required to turn the scale with a weight of $\frac{1}{4}$ lb. in the opposite pan was less than $\frac{1}{4}$ lb. by the weight of the disc—that is, about 2 or $2\frac{1}{2}$ drachms. The weight of the disc was as nearly as might be equivalent to the weight of the paper bag or wrapper in which each quantity of the tea was to be placed, and the tea was so weighed out for the purpose of obtaining upon each weighing such a quantity of tea as with its bag or wrapper would weigh exactly a quarter of a pound. The second of the scales had a folded paper bag placed underneath the scoop in which the tea was being weighed. This bag was being used for the same purpose and with the same effect as the disc above referred to. The respondents weighed out tea in these quantities only for those customers who were retail dealers in tea, and who requested to be supplied with it so packed. These customers themselves supplied the bags or wrappers to the respondents for the purpose of the respondents putting up the tea in them, and each of the bags or wrappers had printed on it an intimation that the weight of the paper was included. At the time of the inspector's visit other scales in the same condition as the two scales which were the subject of the informations were being used at the respondents' premises for weighing out tea for the above-mentioned customers, and there were also in use a number of scales for weighing out tea in full weights, and all these last-mentioned scales were correct and just. Directions had been given by the respondents to their employees, who worked under proper supervision, not to use scales with a metal disc or paper bag to weigh out tea for any customers other than those above referred to. The respondents did not sell tea by retail. The beam scales in question in the condition referred to were respectively used for trade by the respondents with the customers referred to, and in such cases were

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respectively physically incorrect to the extent and in the manner described. The respondents acted fairly towards their customers, and only gave them what they asked for.

The appellants contended that the beam scales were respectively false or unjust within the meaning of s. 25 of the Weights and Measures Act, 1878, and they relied upon the case of *Lane* v. *Rendall*. (1) The respondents contended that to constitute an offence under that section the scale must be false or unjust with reference to the trade use that is in fact being made of it, and they relied upon *Withall* v. *Francis* (2) and *Crick* v. *Theobald*. (3)

The finding of the magistrate was in these terms: "But for the fact that the customers had requested the respondents to supply the tea in such quantities and so packed as aforesaid I should have followed the case of *Lane* v. *Rendall* (1) and convicted the respondents, but it appeared to me to be impossible to say that the beam scales were false or unjust in the face of such request; the cases of *Withall* v. *Francis* (2) and *Harris* v. *Allwood* (4) appeared to me to establish the contrary, and I accordingly decided to dismiss the informations."

The question of law for the opinion of the Court was whether upon the facts above stated the learned magistrate was right in law in dismissing the informations.

Dickens, *K.C.* (*Daldy* with him), for the appellants. The respondents should have been convicted. The learned magistrate has not kept in mind the distinction between s. 25 and s. 26 of the Act. (5) Under s. 26 the consent of the purchaser is a most material element upon the question of fraud; but s. 25 is of universal application, and under it the question of motive is wholly immaterial. A machine which is unjust

(1) [1899] 2 Q. B. 673.
(2) (1878) 42 J. P. 612.
(3) (1895) 64 L. J. (M.C.) 216.
(4) (1892) 57 J. P. 7.
(5) By 41 & 42 Vict. c. 49 (The Weights and Measures Act, 1878), s. 25, "Every person who uses or has in his possession for use for trade any weight measure scale balance steelyard or weighing machine which is false or unjust, shall be liable to a fine. . . . " By s. 26, "Where any fraud is wilfully committed in the using of any weight measure scale balance steelyard or weighing machine, the person committing such fraud, and every person party to the fraud, shall be liable to a fine. . . ."

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within the meaning of the section is one which is not truly adjusted. There is an obvious danger in allowing a scale to be manipulated as was done in the present case, for in the absence of supervision it might be used by the servants of the trader for an improper purpose: *Great Western Ry. Co.* v. *Bailie*. (1) It is therefore no answer to the charge to say that it was only being used for a special purpose. The scale must be accurate in fact, and not merely capable of being made accurate or of being used so as to be accurate. The case is practically indistinguishable from *Lane* v. *Rendall*. (2)

[He was stopped by the Court.]

Avory, K.C. (*George Elliott* with him), for the respondent. Upon the facts stated in the case the summons was rightly dismissed. The machine in itself was just and accurate, and in that sense was in compliance with s. 25; it does not become unjust by reason of the way in which it is being used; all that happens is that at the moment of using it the two sides of the scale do not exactly correspond because of the arrangement with the purchaser. *Lane* v. *Rendall* (2) is distinguishable; that was the case of a retail dealer, and the essence of the decision was that the purchaser was entitled to get a pound of tea, and not a pound of tea and paper; besides, there was no finding in that case that the purchaser assented. The case of *Great Western Ry. Co.* v. *Bailie* (1) supports the view that the section is directed against machines which are in themselves unjust, and not against the particular use of an otherwise just machine. The present case is indistinguishable from *Withall* v. *Francis* (3), where it was held that the particular mode in which a weighing machine in itself correct was used with the purchaser's assent did not make the machine either incorrect or unjust.

Dickens, K.C., in reply. This is not a case of adjusting the weights on the two sides of the machine with the object of accurately weighing the thing intended to be weighed, as was the case in *Withall* v. *Francis* (3); the effect in the one case of fastening the copper disc to the machine, and in the other

(1) (1864) 5 B. & S. 928; 34 L. J. (M.C.) 31.

(2) [1899] 2 Q. B. 672.

(3) 42 J. P. 612.

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case the paper bag, was to make them respectively parts of the weighing machine; and while they were parts of it it was impossible for the machine to shew a just and accurate balance.

Cur. adv. vult.

Dec. 9. LORD ALVERSTONE C.J. I confess that I have felt very great difficulty during the arguments, and I am anxious not to appear to lay down any general rule not applicable to the particular case; I have, however, come to the conclusion that the appeal must be allowed. There seem to me to be two classes of case which fall within the scope of s. 25: the one, where scales are used, or had in possession for use—that is, used, or kept for use—in a state which is an infringement of the Act, or which makes them false or unjust; the other, where honest scales are honestly used in a particular way for the purpose of carrying out a particular weighing operation. The two classes are illustrated by *Lane* v. *Rendall* (1) on the one side and *Withall* v. *Francis* (2) on the other. I do not wish to be thought to lay down any rule that it is an infringement of s. 25 honestly to use scales that are otherwise just for the purpose of carrying out a particular operation by temporarily adjusting them for a given purpose, and the difficulty that has pressed upon me is upon the facts stated within which class of case the present case falls. For reasons which I will very briefly state, I have come to the conclusion that it falls within the class of case in which the person against whom the proceedings have been taken has had in his possession an unjust balance.

The difficulty which presses upon me is whether the facts found by the magistrate shew that what was done was a mere temporary adjustment of an honest balance for use for a particular purpose, or whether they amount to the having in the trader's possession a scale which is inaccurate and unjust, contrary to s. 25. Upon the facts stated, I think it must be taken that not only these two scales, but others open to the same objection, were regularly kept in the condition to which

(1) [1899] 2 Q. B. 673. (2) 42 J. P. 612.

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objection has been taken. One of the scales had a metal disc fixed by wire in order to adjust the weight of the paper; the other scale had a folded paper bag placed underneath the scoop in which the tea was being weighed; in other words, the two scales were in such a condition that the material placed in the weighing scoop would not be justly weighed. I think it is not an unfair method of construing s. 25 to say that, while there may be a temporary use of scales so as to make them carry out a particular weighing operation which is honest in itself, and which both buyer and seller wish to be performed, the instrument in its normal condition as kept for use must be in a condition to weigh justly, by which I mean accurately, that which is put in it to be weighed. In the present case the scales as kept will not weigh accurately the tea that is put into the scoop: they will weigh it plus the weight of the paper bag which is underneath the scoop in the one case, or of the metal disc which is fastened to the arm of the scale in the other.

The case states that the respondents weighed out tea only for those customers who were retail dealers in tea who requested to be supplied with it so packed, and that the customers supplied the bags or wrappers. It goes on in these words: "At the time of the inspector's said visit other scales in the same condition as the two scales the subject of the informations were being used at the respondents' premises for weighing out tea for such customers as aforesaid, and there were also in use a number of scales for weighing out tea in full weights, and all these last-mentioned scales were correct and just. Directions had been given by the respondents to their employees, who worked under proper supervision, not to use scales with a metal disc or paper bag to weigh out tea for any customers other than those above referred to." I think that that statement shews that these scales were permanently kept in that condition, and that it required supervision and superintendence to prevent their being used for an improper purpose. That points, in my opinion, to a condition of things which, though it may be perfectly innocent in itself and may not amount to a substantial breach of the

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provisions of the section, still is a contravention of the statutory provision, because the scales are kept in a condition in which they will not accurately and justly weigh that which is put in to be weighed. That the learned magistrate took that view seems clear from the grounds upon which he dismissed the summons. He says: "But for the fact that the customers had requested the respondents to supply the tea in such quantities and so packed as aforesaid I should have followed the case of *Lane* v. *Rendall* (1)"; in other words, he has adopted the argument addressed to us on behalf of the respondents that the request to carry out this particular mode of weighing was an answer to the summons. If I had come to the conclusion that a temporary adjustment was made solely for the time when these scales were being used for this particular purpose, and that the condition in which the scales were found by the inspector was not their condition as ordinarily kept, I should have come to a different conclusion. I think, however, that the magistrate has found that the scales were kept in a condition in which they would not accurately or justly weigh that which was put in to be weighed; in that state of facts he has thought that a mere request by customers to have their tea so weighed was an answer to the summons; and, as I am unable to agree with that view, I think that the appeal must be allowed.

With regard to the authorities which were cited here or below, *Crick* v. *Theobald* (2) seems to have nothing to do with the case. *Withall* v. *Francis* (3) undoubtedly was a case coming within what I have called the temporary use of proper scales for a given purpose, and I am anxious that it should not be thought that I am deciding that there is anything unlawful in doing what was recognised by the Court as lawful in that case. Although *Lane* v. *Rendall* (1) is exactly on the lines which I have indicated, I do not think it can be recognised as laying down a rule apart from the facts of the case, for I have no doubt that in that case the scales were being used for weighing paper and tea under the name

(1) [1899] 2 Q. B. 673. (2) 64 L. J. (M.C.) 216.
(3) 42 J. P. 612.

of weighing tea; therefore, although no fraud was found, for it was found to be done for other purposes, yet the scales were in fact being kept and used in the unjust condition which I have already referred to—that is to say, not in the condition of weighing fairly and justly the tea that was put into the scale.

In the present case the breach has been obviously a technical one, and I do not suppose it will be suggested that the respondents, who weighed tea to be put into bags which themselves indicated that the bags were included in the weight, were doing anything in the least morally wrong; I think, however, that they have brought themselves within the mischief of the section, for, as was pointed out during the argument, if supervision is required to regulate the use of scales so adjusted, they may be used for weighing other things at times when the supervision fails. The magistrate ought, therefore, to have convicted, notwithstanding the request of the customers to have their tea weighed so as to include the weight of the bag, and the appeal must be allowed.

LAWRANCE J. I am of the same opinion, upon the ground that the respondents beyond doubt had in their possession, or were using, a scale which was false and unjust at the time of the visit of the inspector. The object of the statute clearly was not that, when it is found that a scale is being used which is unjust, there should be an inquiry as to whether any fraud has been committed or not. The question is not whether the scale is false and unjust towards the particular customer for whom it is being used, but whether it is false and unjust in fact. Nobody can doubt that the scale in the present case was, if used for any other purpose than weighing tea for these particular customers, false and unjust at that time; nobody can doubt that if the metal disc or paper bag had been concealed there would have been a fraud. The view which I take of s. 25 is strengthened on reference to s. 26, which deals with fraudulent user. There is no pretence for suggesting fraudulent user in the present case, but it would impose a heavy burden upon inspectors of weights and measures if they had to inquire in every instance whether the customer had

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been taken in or not. Sect. 25 seems to me perfectly clear, and includes any persons who have in their possession weights and scales which are in fact false and unjust, although they are not so to the injury of the customer, for in that case there would be an offence under s. 26; and that is, I think, the effect of the decision in *Lane* v. *Rendall*. (1) I agree, therefore, that this appeal must be allowed.

KENNEDY J. I am of the same opinion. The informations charge the respondents with using for trade a weighing machine, to wit, a beam scale, which was false or unjust. It seems to me that the object which for obvious public reasons was sought to be attained by this section, and which, as I construe it, the section does attain, is this: the weighing instrument itself must be such as in its condition, when it is being used for trade, gives a just and true, that is an accurate, result as regards the weight of the thing placed in the scales. My view of this section is that the trader makes himself liable, however honest his intent, if in fact he uses or employs an adjustment which is not an adjustment of the thing within the scale—that is, the thing to be weighed—but is an adjustment which affects the truth and accuracy of the weighing machine itself. I think there is a fallacy in the suggested analogy of an adjustment by putting a weight with a certain quantity of the article to be weighed into one scale in order to get a result which could not otherwise be attained, owing, we will suppose, to the trader having only a 4 lb. weight when a 3 lb. quantity of the article was all that was to be weighed on the other side. It does not affect the truth or accuracy of the machine so as to make it a false or unjust machine if all that is done is to put into the scale as part of the thing to be weighed any weight you like, because in that case what is shewn by the weight on the other side, on the balance, is a true result, i.e., 3 lb. of tea plus a 1 lb. weight on one side, and a 4 lb. weight on the other. But if, with the most honest purpose and at the request of the purchaser, you try to obtain an adjustment by an alteration of the machine itself, which

(1) [1899] 2 Q. B. 673.

affects its accuracy as an instrument, you are then using a machine for trade which is false or unjust. In my opinion the argument as to the acquiescence or request of the purchaser in cases under this section, as distinguished from cases under s. 26, is irrelevant, and I will give what seems to me to be an illustration of the danger which might arise if such a contention were to prevail. A trader has a machine which, either as originally constructed is or (by accident or by user) has become faulty and inaccurate; a purchaser enters who asks for tea purchased by him to be weighed; the trader says that his weighing machine is inaccurate, but the purchaser replies that they will get as near the weight as they can. This is as strong a case as I can imagine both of honesty in the trader and of a request by the customer; but I feel no doubt that if in that case the trader weighed the tea in the machine that was inaccurate, and the inspector were to enter the shop at that moment and see the operation, the section would apply; it would not be possible to say that the trader was not using a machine which was false or unjust. The object of the section is to ensure the safety of the public from loss, not only in the user by the trader, but also in his possession, of an accurate machine. An accurate machine is one which shews correctly the weight of the thing put into the scale which is to hold the goods to be weighed; if by reason of any adjustment of the machine the trader makes the machine represent as the result of the operation that which is not the fair weight of the thing in the scale by reason of the alteration or adjustment of the machine, it appears to me that, whether the user is acquiesced in by the purchaser or not, and whether it happens on one or many occasions, there is a user of the machine which comes within the terms of the section. There is no reason why the trader should not put into the scale any weights that are necessary to the balance, i.e., why, if he has in his possession only a weight which is larger than the desired weight of the goods to be arrived at by weighing, he should not (as in the example I have already put) counterbalance the excess of the weight by

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putting in the scale in which the goods are placed, honestly of course, a makeweight with the goods; to that there is no objection. But if the machine itself is altered, so that as it stands the weight of the contents of the scale or scoop which holds the goods is not truly represented on the index, I think that s. 25 has been contravened, and that there has been a user of an instrument which is false or unjust within the meaning of the section.

Appeal allowed.

Solicitor for appellants: *W. A. Blaxland.*
Solicitors for respondents: *Lamb, Son & Prance.*

W. J. B.

1903
Dec. 8.

HARDWICK, APPELLANT; LANE, RESPONDENT.

Lottery—Sweepstakes on Horse-race—Gaming Act, 1802 (42 *Geo.* 3, *c.* 119), *s.* 2.

The appellant, the keeper of a beerhouse, arranged for a sweepstakes on a horse-race to be held on his premises. Sixty-one persons entered, each of whom paid 6*d.* to the appellant; and prizes amounting in the aggregate to 30*s.* were paid by the appellant to the persons who respectively drew the first three horses in the race, less the price of a certain quantity of beer which by the conditions of the sweepstakes had to be bought from the appellant by the prize-winners:—

Held, that the sweepstakes was a lottery within s. 2 of the Gaming Act, 1802.

CASE stated by justices.

At a Court of summary jurisdiction an information was preferred by the appellant against the respondent, a beerhouse keeper, alleging that the respondent on March 27, 1903, unlawfully and knowingly did suffer to be exercised, kept open, and exposed to be played and drawn by numbers and figures and by other contrivances a certain lottery usually called a sweepstakes not then authorized by Parliament, to wit, a lottery for money prizes in respect of horses who should win or run second or third to the winner in a certain steeple-

chase, in the house of the respondent, contrary to the form of the statute in such case made and provided. (1)

The facts as proved or admitted were as follows: The respondent arranged for a sweepstakes to be held at his beer-house on March 24, 1903, and three following days in connection with the Grand National Steeplechase which took place on March 27. There were sixty-one entries for the sweepstakes, and each person entering paid 6*d.* to the respondent, who offered three prizes dependent on the result of the steeplechase, namely, first prize, 15*s.*; second, 10*s.*; third, 5*s.* One of the conditions of the sweepstakes was that the winner of the first prize was to pay the respondent for two gallons of beer to be consumed in his house, and the winners of the second and third prizes were respectively to pay for one gallon and two quarts.

The names of the various persons who entered for the

(1) 42 Geo. 3, c. 119, s. 2: "No person or persons whatsoever shall publicly or privately keep any office or place to exercise, keep open, shew or expose to be played, drawn or thrown at or in, either by dice, lots, cards, balls, or by numbers or figures, or by any other way, contrivance or device whatsoever, any game or lottery called a little goe or any other lottery whatsoever not authorized by Parliament, or shall knowingly suffer to be exercised, kept open, shewn or exposed to be played, drawn or thrown at or in, either by dice, lots, cards, balls, or by numbers or figures, or by any other way, contrivance or device whatsoever, any such game or lottery in his or her house, room or place, upon pain of forfeiting for every such offence the sum of five hundred pounds to be recovered in the Court of Exchequer at the suit of His Majesty's Attorney-General, and to be to the use of His Majesty, his heirs and successors, and every person so offending shall be deemed a rogue and vagabond within the true intent and meaning of an Act passed in the seventeenth year of the reign of His late Majesty King George the Second intituled 'an Act to amend and make more effectual the law relating to rogues, vagabonds, and other idle and disorderly persons, and to houses of correction,' and shall be punishable as such rogue and vagabond accordingly."

By 5 Geo. 4, c. 83, s. 1, all provisions theretofore made relative to rogues and vagabonds were repealed, but s. 21 provides, "that wherever by any Act or Acts of Parliament now in force it is directed that any person shall be punished . . . . as a rogue and vagabond . . . . for any offence specified in such Act or Acts and not hereinbefore provided for by this Act, in every such case, whether such person shall or shall not have committed any offence against this Act, every such person shall be punished under the provisions, powers, and directions of this Act."

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sweepstakes were put down in a list with numbers opposite their names, and, after the winners had been ascertained by a drawing which took place at the respondent's beerhouse, the prizes were paid to the winners thereof by the respondent, less the price of two gallons, one gallon, and two quarts of beer respectively as before mentioned, the price of the beer being deducted from the prizes.

After hearing the evidence and arguments on behalf of the appellant and respondent, the justices were in doubt whether a sweepstakes was an illegal lottery punishable on summary conviction, and they dismissed the information subject to this case.

The question of law for the opinion of the Court was whether a sweepstakes was an illegal lottery punishable on summary conviction (1), and whether the respondent ought to have been convicted.

Avory, K.C. (*Stutfield* with him), for the appellant. The respondent ought to have been convicted. The ordinary definition of a lottery is a distribution of prizes by lot or chance. The authorities are clear that a sweepstakes is a lottery: *Allport* v. *Nutt* (2); *Gatty* v. *Field* (3); *Mearing* v. *Hellings*. (4) In *Reg.* v. *Hobbs* (5) a licensed victualler who had promoted a sweepstakes on a horse-race was indicted under the Betting Act, 1853. Lord Russell of Killowen C.J., while holding that the defendant had not committed any offence under that Act, expressed the opinion that if proceedings had been taken against him under the Lottery Acts he might have been convicted.

J. B. Matthews, for the respondent. The essential ingredient of an illegal lottery is that the promoter should make a profit out of it. This clearly appears from the terms of the earlier Lottery Acts, which were passed, not in the interests

(1) It was admitted by counsel for the respondent that if the respondent had committed the offence charged he was liable to be punished on summary conviction.

(2) (1845) 1 C. B. 974.
(3) (1846) 9 Q. B. 431.
(4) (1845) 14 M. & W. 711.
(5) [1898] 2 Q. B. 647.

of public morals, but in order to prevent private lotteries from competing with Government lotteries, which were then an important source of revenue. In the present case the respondent made no profit, or if any it was so trifling, being only 6*d*., that it may be disregarded. The cases cited do not support the appellant's contention, for in none of them does it appear that the promoter of the lottery was not making a substantial profit. The justices therefore acted rightly in dismissing the information.

LORD ALVERSTONE C.J. I am of opinion that the authorities shew beyond all doubt that this sweepstakes was a lottery within the Act of 1802. If it be necessary to prove that the respondent made a profit out of the sweepstakes, there is clear evidence that he did so, because the prizes awarded did not equal the amount subscribed; but in the absence of that evidence I should have been prepared to hold that the mere fact that persons were attracted to the respondent's licensed premises by means of the sweepstakes was quite sufficient evidence of profit. The appeal will therefore be allowed, and the case must go back to the justices for them to convict the respondent.

LAWRANCE and KENNEDY JJ. concurred.

Appeal allowed.

Solicitors for appellant: *Blundell, Gordon & Co., for Thornely, Worcester.*

Solicitor for respondent: *Ernest W. Moore, Tewkesbury.*

F. O. R.

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Dec. 9.

McNAIR *v.* BAKER.

Nuisance—Black Smoke—Chimney of Private Dwelling-house—Club—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *s.* 24 (*b*).

By the Public Health (London) Act, 1891, s. 24 (*b*), "any chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such quantity as to be a nuisance" is declared to be a nuisance liable to be dealt with summarily under the Act.

A club of 750 members, managed by a committee of the members, had for many years occupied premises which had previously been a private dwelling-house; the premises comprised the ordinary accommodation of a club, and there were five bedrooms for the use of the members and eight for the club staff. In the basement were cooking ranges, a large roasting grate, and a vertical boiler with furnace attached, which latter were used for heating the premises; the smoke from all of them was discharged into one flue or chimney, which sent forth black smoke in such quantity as to be a nuisance. A summons against the respondent, the club secretary, for making default in complying with a notice of the local authority requiring him to abate the nuisance was dismissed by the magistrate on the ground that the chimney was the chimney of a private dwelling-house:—

Held, that the dismissal of the summons was wrong; that the premises as used were not a private dwelling-house within the meaning of the section, and that the respondent ought to have been convicted of the offence charged.

CASE stated by a metropolitan police magistrate, from which the following facts appeared.

The respondent had appeared upon a summons to answer the complaint of the appellant, a sanitary inspector for the city of Westminster, which alleged that the respondent, on December 4, 1902, unlawfully made default in complying with the requisitions of a notice dated October 31, 1902, and served upon him by the Westminster City Council under the provisions of the Public Health (London) Act, 1891, requiring him to abate a nuisance arising from black smoke having been allowed to issue from a furnace chimney and to prevent a recurrence of the same at his premises situate and being St. James' Club. At the hearing the following facts were proved or admitted.

The appellant was a sanitary inspector of the city of Westminster, and was acting as complainant with the authority of the council, and the respondent was the secretary of the St. James' Club, and represented the club in these proceedings. The club premises had been watched by the appellant, and quantities of black smoke had been observed to issue from them in the months of October, November, and December, 1902. On October 1, 1902, an intimation notice was served by the appellant on the club; this notice was signed by the appellant and directed to the respondent, and gave notice of the existence of a nuisance at the St. James' Club arising from black smoke having been allowed to issue from the chimney, and requested that the nuisance should be abated within three days. The issue of black smoke did not abate, and on October 31, 1902, a statutory notice under s. 4 of the Public Health (London) Act, 1891, addressed to the respondent, was served. This notice stated that the Westminster City Council, being satisfied of the existence at the St. James' Club of a nuisance arising from a chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such quantity as to be a nuisance, thereby required the respondent forthwith or within fourteen days from service of the notice to abate such nuisance, and to execute such works and do such things as might be necessary for that purpose, and also within the said period to do what was necessary for preventing the recurrence thereof.

The club was managed by a committee, and had occupied the premises for thirty or forty years; the premises had been previously used as the French Embassy. The club consisted of 750 members, and its premises comprised the ordinary accommodation of a West End club. There were two dining-rooms for the general use of members, and also private dining-rooms, which might be engaged by members without extra payment for special occasions. There were five bedrooms for the use of members, four of which might be hired by members for a week only at one time, and the remaining one might at the discretion of the committee be hired by a member for three, six, nine, or twelve months at one time. The use of the bedrooms was in those and other respects subject to the rules of

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the club and the regulations of the committee thereunder. There were eight other bedrooms for the use of the staff of the club. The club was open during particular hours according to the rules, and the food was bought by the committee and sold to members. In the basement of the premises there were several covered-in cooking ranges, a large roasting grate, and a vertical boiler with furnace attached. The smoke from these various arrangements discharged into one flue, which was the chimney complained of. The principal part of the smoke emitted from the flue originated in the furnace and boiler, which were used for the purpose of heating the premises.

The respondent contended that the chimney was the chimney of a private dwelling-house within the meaning of s. 24 (*b*), and was therefore not liable to be dealt with under the provisions of the Public Health (London) Act, 1891. The appellant contended that the words "private dwelling-house" meant a family residence or home, and that the use of the premises excluded them from the exemption contained in the section, and that as the chimney sent forth black smoke in such quantity as to be a nuisance, it was liable to be dealt with under the Act.

The learned magistrate found as a fact that the respondent did not abate the nuisance, or do what was necessary to prevent its recurrence, or otherwise comply with the statutory notice; and further that the chimney sent forth black smoke in such quantity as to be a nuisance. But he held on the construction of s. 24 of the Act that the chimney was the chimney of a private dwelling-house within the meaning of the section, and dismissed the summons without costs.

The question for the opinion of the Court was whether upon the facts set out in the case the chimney was the chimney of a private dwelling-house, and whether the club premises, as used by the club, were a private dwelling-house within s. 24 (*b*) of the Public Health (London) Act, 1891.

Macmorran, K.C. (*Joseph Hurst* with him), for the appellant. The chimney was not the chimney of a private dwelling-

house. It is impossible to contend that a club for 750 members is a private dwelling-house, although there may be a few bedrooms for the use of the members. The case is very similar to *Queen Anne Residential Mansions and Hotel Co.* v. *Mayor of Westminster* (1), where a building containing 300 sets of residential chambers was held not to be a private dwelling-house. The expression "private dwelling-house" or "private residence" must be interpreted in its ordinary and popular sense: *German* v. *Chapman*. (2) To use a house as a boarding-house is a breach of a covenant not to use it for any other purpose than a private residence: *Hobson* v. *Tulloch* (3); and where the tenants of a large building, adapted to occupation in residential flats, held under an agreement in common form binding them to rules suitable only to residential purposes, an injunction was granted to restrain the conversion of a large part of the building into a club: *Hudson* v. *Cripps*. (4)

Boydell Houghton, for the respondent. The last cases cited are decisions on the construction of a covenant, and depend upon wholly different considerations; they are not authorities upon this question. The expression "chimney of a private dwelling-house" in s. 24 is used in contradistinction to a chimney used for purposes of a trade or business, and the magistrate in finding that this was the chimney of a private dwelling-house has negatived any user for trade or business purposes. The chimney itself is no larger than it was at the time when the building was unquestionably a private dwelling-house. Regard must be had to the purpose for which the chimney was originally constructed and the use to which it is put; it was originally constructed for a private dwelling-house, and it is chiefly used for heating the building—a user which is not peculiar to clubs, for most large private dwelling-houses have a warming apparatus. The case of *Queen Anne Residential Mansions and Hotel Co.* v. *Mayor of Westminster* (1) is distinguishable, for the judgment of the Court proceeded upon the ground that it was a large trade establishment, whereas in the present case no trade was carried on.

(1) (1901) 46 Sol. J. 70.
(2) (1877) 7 Ch. D. 271.
(3) [1898] 1 Ch. 424.
(4) [1896] 1 Ch. 265.

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LORD ALVERSTONE C.J. I am clearly of opinion that this appeal must be allowed. The learned magistrate, in construing the Act of Parliament, seems to have overlooked the force and effect of the facts found by him as stated in the case. He has found that this house was used for the reception of the members of a club, and that there were appliances for the cooking of the members' meals and for the warming of the club; in addition to these facts, there were bedrooms for a certain number of the members and of the servants. The only question we have to determine is whether a house so used is a private dwelling-house within the meaning of the Public Health (London) Act, 1891. Apart from authority, it seems to me impossible to come to the conclusion that as a matter of law these premises are a private dwelling-house. We are not dealing with the construction of the premises, but with their user, and, having regard to the language of the section, I do not think it can be properly contended that premises so used are a private dwelling-house. The learned magistrate ought to have convicted the respondent, and the case must be sent back to him with a direction to that effect.

LAWRANCE and KENNEDY JJ. concurred.

Appeal allowed.

Solicitors for appellant: *Allen & Son.*
Solicitors for respondent: *Norton, Rose, Norton & Co.*

W. J. B.

[IN THE COURT OF APPEAL.]

C. A. 1903 *Dec.* 10.

WEAVINGS *v.* KIRK & RANDALL.

Employer and Workman—Compensation—Undertakers—Warehouse—"Actual Use or Occupation"—Workmen's Compensation Act, 1897 (60 & 61 *Vict.* c. 37), s. 7, *sub-s.* 2—*Factory and Workshop Act*, 1901 (1 *Edw.* 7, c. 22), s. 104.

The respondents had contracted to erect certain pigeon-holes twelve feet high in the upper storey of a warehouse, which was being built within the precincts of Woolwich Dockyard for the Government by other contractors. A workman, who was employed by the respondents in that work together with ten or twelve other men, was killed through an accident arising out of and in the course of his employment. At the time of the accident, the lower storey of the warehouse was already in use by the Government for the storage of military accoutrements; the foreman and two workmen of the contractors for the building were engaged at work in the upper storey; and the Government by their own workmen were fixing hydraulic cranes at each end of the floor. The clerk of the works of the Government was in charge of the work, to see that the men did their duty, and the contractors complied with the specifications. The premises were locked, and unlocked, by the person in charge of the dockyard, and the keys were kept by the man at the gates. Upon a claim for compensation by the widow of the deceased under the Workmen's Compensation Act, 1897:—

Held, that, the respondents having such use or occupation of part of the warehouse as was necessary for the work which they had contracted to do, they were in actual use or occupation thereof within the meaning of the Factory and Workshop Act, 1901, s. 104, and therefore "undertakers" in respect thereof under the Workmen's Compensation Act, 1897, s. 7, sub-s. 2.

Bartell v. *W. Gray & Co.*, [1902] 1 K. B. 225, followed.

APPEAL from the refusal of the judge of the Woolwich County Court to award compensation to the appellant, the widow of a deceased workman, under the Workmen's Compensation Act, 1897.

The facts as appearing from the county court judge's notes were as follows. Some time before the accident occurred to the deceased in respect of which compensation was claimed, the Government had commenced to erect a large store or warehouse within the precincts of the Royal Dockyard at Woolwich. It consisted of two storeys, each about 25 feet

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high, the building occupying a space of 150 feet in length by 100 feet in breadth. The store was being erected for the Government by contractors named Messrs. Mundy. On the day when the accident happened, they had completed the building except the cupboard doors and locks on the upper floor. The lower floor, which was lighted by apertures in the floor above, was already occupied by the Government for the storage of military accoutrements. The Government, requiring some pigeon-holes in the upper floor for further storage, had entered into a contract with Messrs. Kirk & Randall, the respondents, for their erection. They were to be made to a height of twelve feet from the floor. The deceased workman, who was employed by the respondents in the work of erecting these pigeon-holes, while engaged with other men in handling a heavy plank, fell through one of the before-mentioned apertures in the floor, and was killed. At the same time that Messrs. Kirk & Randall's men, to the number of ten or twelve, were making the pigeon-holes, Messrs. Mundy's foreman and two men were engaged on the same floor, finishing doors, putting on locks, and painting, and the Government were, by their own workmen, engaged in fixing hydraulic cranes at each end of the floor. The clerk of the works of the Government was in charge of the work, to see that the men did their duty, and that the contractors complied with the specifications. The premises were locked, and unlocked, by the person in charge of the dockyard. The keys were kept by the man at the gates. The county court judge held upon these facts, as a matter of law, that there was no user or occupation of the premises by Messrs. Kirk & Randall, which would make them undertakers in respect of a factory within the meaning of the Workmen's Compensation Act, 1897, and therefore refused to award compensation to the appellant.

Rucgg, *K.C.*, and *W. M. Thompson*, for the appellant. This case is really covered by the decision of this Court in *Bartell* v. *W. Gray & Co.* (1) That case shews that it is not necessary, in order to satisfy the words "actual use or occupation" in

(1) [1902] 1 K. B. 225.

the Factory and Workshop Act, 1901, s. 104 (which section is now substituted for the corresponding section of the repealed Factory and Workshop Act, 1895), that there should be exclusive occupation of the premises which constitute a factory. It is sufficient, if there was such occupation of the premises as was necessary for the purposes of the work for which they were being used by the respondents.

[They also cited *Merrill* v. *Wilson*. (1)]

A. Powell, *K.C.*, and *W. Addington Willis*, for the respondents. The case of *Merrill* v. *Wilson* (1) shews that there must be use or occupation of some sufficiently definable area to constitute use or occupation of a factory within the meaning of the Factory Acts. It was there held that the portion of a quay occupied by a ship for the purpose of unloading was such an area. There was no actual use or occupation of any definable area in the warehouse in this case. It was further said in *Merrill* v. *Wilson* (1) that the use or occupation must be substantially exclusive as regards the essential purpose for which the subject-matter used or occupied is intended; so that casual user or occupation for merely incidental purposes will not suffice. In *Merrill* v. *Wilson* (1) there was practically exclusive user of part of a quay for the essential purpose for which a quay is intended, namely, unloading a ship. In the present case the Government was in occupation of the warehouse as a warehouse; and at any rate there was no exclusive user or occupation of it as such by the respondents. It cannot be said that the work of erecting pigeon-holes in a warehouse is the essential purpose for which a warehouse is to be used, any more than it can be said that the construction of any fittings in a house, to make it more convenient for occupation, is the essential purpose for which the house is intended. In *Bartell* v. *W. Gray & Co.* (2) it would appear that the whole ship might be looked upon as practically placed in the possession of the employers for the purpose of being refitted, and such of the crew as remained on board were only there as caretakers. That is very different from the present case, where the owners were themselves in occupation

(1) [1901] 1 K. B. 35. (2) [1902] 1 K. B. 225.

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of the building, and workmen of other contractors were also doing work in it. In *Bartell* v. *W. Gray & Co.* (1) the liability arose because the ship was for the time being premises forming part of a dock, and an essential use of a dock is for refitting and repairing ships.

Ruegg, K.C., was not called on to reply.

COLLINS M.R. This is an appeal from the decision of a county court judge upon a claim made under the Workmen's Compensation Act, 1897, by the widow of a deceased workman, who, in the course of his employment by the respondents, met with an accident, by which he was killed. The respondents had entered into a contract to erect pigeon-holes in what was admittedly a warehouse within the Act; and they appear to have had such use or occupation of the premises as was necessary for the performance of that work, which was essential to the use of the warehouse for the purposes for which it was required by the Government. The deceased met with the accident which caused his death while engaged on the work for which the respondents had so contracted. The question is whether they are liable to make compensation to the appellant under the Workmen's Compensation Act, 1897. They are so liable, if the deceased man was employed in a "factory" in respect of which they were the "undertakers." It is admitted that this warehouse was a "factory" within the Act. Therefore the only question is whether the respondents were "undertakers" in respect of it. They were such "undertakers" if they were occupiers thereof within the meaning of the Factory and Workshop Act, 1901. By s. 104 of that Act it is provided that for the purpose of enforcing certain provisions of that Act "the person having the actual use or occupation of a dock, wharf, quay, or warehouse, or of any premises within the same, or forming part thereof," shall be deemed to be the occupier of a factory. The only question in this case is whether the respondents had the actual use or occupation of this warehouse within the meaning of that provision. It appears to me that this question is

(1) [1902] 1 K. B. 225.

really decided by the case of *Bartell* v. *W. Gray & Co.* (1) The respondents in this case had all such occupation of a considerable space in a warehouse as was necessary to enable them to carry out the work which they had contracted to do. It was argued that they did not occupy any part of the warehouse quâ warehouse. I do not know that it is necessary that they should so occupy for the purposes of the Act, or that we ought to go beyond the words of the section itself in this respect; but, assuming that it is necessary, it is essential to the existence of a warehouse, and its use as such for the purposes for which it is required, that works or repairs of the kind which the respondents had contracted to do should be performed within it. I think that the respondents in this case plainly had the "actual use or occupation" of a factory within the meaning of those words as interpreted in the case of *Bartell* v. *W. Gray & Co.* (1) I am dealing with this as a question of law. It is, in my opinion, clear that the county court judge intended to decide this question as a matter of law and not as a matter of fact. He has ascertained the facts, leaving to us the question whether the conclusion of law which he drew from them was correct. I cannot agree with his decision on the question of law, and therefore I think this appeal must be allowed.

MATHEW L.J. I am of the same opinion. Since the decision in *Bartell* v. *W. Gray & Co.* (1), I should have thought there could be no question in this Court that several persons may at the same time be occupiers of premises within the meaning of the Act for different purposes. That being once established, the inference appears to me to be inevitable that in this case the respondents were "undertakers" in respect of a factory for the purposes of the Workmen's Compensation Act, 1897. They were in occupation of part of the warehouse for the purpose shewn by the evidence in this case, namely, of fitting it as a warehouse.

COZENS-HARDY L.J. I agree. I cannot doubt that the respondents had the actual use or occupation of part of the

(1) [1902] 1 K. B. 225.

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warehouse so far as was necessary for doing the work which they had contracted to do; and, that being so, the case is covered by the decision in *Bartell* v. *W. Gray & Co.* (1)

Appeal allowed.

Solicitor for appellant: *T. E. Crocker.*
Solicitors for respondents: *Treadwell & Aylwin.*

E. L.

C. A. 1903 *Dec.* 15.

[IN THE COURT OF APPEAL.]

WEBSTER *v.* SHARP & CO., LIMITED.

Employer and Workman—Workman's Compensation—Partial Incapacity for Work—Maximum Amount of Compensation—Discretion of County Court Judge—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *Sched. I., clauses* 1 (*b*), 2.

In awarding compensation under the Workmen's Compensation Act, 1897, to workmen partially incapacitated for work, a county court judge cannot lay down a general rule that he will award the maximum amount of compensation which can be given under the Act in all cases where that amount and the wages which the workman is earning after the accident added together do not exceed the wages which he was earning before the accident. The judge must exercise his discretion with regard to the circumstances of the particular case.

APPEAL from the award of the judge of the Bradford County Court on a claim for compensation under the Workmen's Compensation Act, 1897.

A workman in the employ of the respondents (2), who was earning 24*s.* 9*d.* a week, as wages, met with an injury through an accident arising out of and in the course of his employment, by which he was incapacitated for work. A claim for compensation having been made by him, an arrangement was entered into by which the respondents were to pay him during his incapacity a weekly sum of 12*s.* 4½*d.*, which was the maximum amount of compensation that could be awarded to

(1) [1902] 1 K. B. 225.

(2) The expression "respondents" is here used with reference to the position of the parties before the county court judge.

him under the Workmen's Compensation Act, 1897. The respondents continued to make this payment weekly for two years, at the end of which time they took the workman back into their employ at wages of 11*s.* a week, and discontinued the weekly payments made as before mentioned. The workman then filed a request for arbitration to fix the amount of compensation to be paid him under the Workmen's Compensation Act, 1897. On giving his decision at the hearing, the county court judge stated the principle on which he acted as follows: "In my opinion the meaning of the Act is that the workman is to receive compensation for his loss of wages, whether this is total or partial, but that for the protection of the employer there is the proviso that no more than half his wages is to be paid him. In the case of partial disablement I think the Court should first ascertain what is the loss of wages the person has sustained—in this case 13*s.* 9*d.* I think, if this is less than the maximum allowed, namely, half the original wages, the whole of such amount ought to be awarded, unless there is some reason to the contrary, but that the Court is not bound to award the whole of that amount, but may award a less amount, say, half the difference, if it sees fit. In this case 13*s.* 9*d.* exceeds the half wages, which are agreed at 12*s.* 4½*d.*; so I cannot give more than that amount; but I see no reason why I should not give the full amount allowed by the Act and award 12*s.* 4½*d.* This is the rule I always follow in these cases, unless some grounds are given for varying it." The county court judge accordingly made an award for a weekly payment of 12*s.* 4½*d.* by way of compensation.

S. T. Evans, K.C., and *Minton-Senhouse*, for the respondents. The county court judge is not entitled to lay down as a general rule that he will in all cases of partial incapacity to work award compensation so as to indemnify the workman as nearly as possible for the loss occasioned. The general policy of the Act appears to be that, inasmuch as, on the one hand, the employer is to be rendered liable though there may have been no negligence on his part, on the other hand the workman is

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not to be fully, but only to a certain extent, indemnified. Sched. I., clause 2, clearly contemplates that, primâ facie, in cases of partial incapacity, the amount awarded ought to bear a proportion to the difference between the workman's earnings before the accident and his earnings after it, and that the maximum should be reduced accordingly. It may be that the county court judge is not bound in such cases to reduce the amount, but may on consideration of the particular circumstances of the case allow the maximum; but he must exercise his discretion with regard to the circumstances.

[MATHEW L.J. Is not the workman intended to bear the risks of his employment to the extent of 50 per cent. of his earnings?]

That would appear to be primâ facie the intention of the Legislature.

[They cited *Pomphrey* v. *Southwark Press.* (1)]

J. J. Wright, for the applicant. The case of *Illingworth* v. *Walmsley* (2) decides that the county court judge may award the maximum in cases of partial incapacity notwithstanding the provisions of Sched. I., clause 2. The judge here may have used some expressions of a general nature, but all the facts were before him, and there is nothing really to shew that he did not exercise his discretion upon them.

S. T. Evans, K.C., in reply.

COLLINS M.R. It appears to me that this case must go back to the county court judge. I do not think the judge is entitled to lay down a hard and fast rule applicable to all such cases. He must exercise his discretion with regard to the facts of the particular case, which he does not appear to me to have done here. Sched. I., clause 1 (*b*), of the Workmen's Compensation Act, 1897, fixes, as the maximum amount of compensation that can be given, both in the case of total, and that of partial, incapacity for work, 50 per cent. of the workman's average weekly earnings; and the result of the decision in *Illingworth* v. *Walmsley* (2) is that in either case the county court judge has power to award the maximum, whether on the

(1) [1901] 1 K. B. 86. (2) [1900] 2 Q. B. 142.

original hearing, or any subsequent application to review the amount of the payment. But, although 50 per cent. of the earnings is fixed as the maximum, it does not follow, of course, that it should be awarded in every case. It may be that in many cases of partial incapacity the county court judge would be well advised not to award the maximum of compensation; but the Act does not debar him from doing so in any case of partial incapacity, if, exercising his discretion with regard to the particular facts of the case, he arrives at the conclusion that it would be right to do so; but he must so exercise his discretion. I think that follows from the words of Sched. I., clause 2, which provides that "in fixing the amount of the weekly payment, regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident." In that provision the Legislature appears to suggest a topic for the consideration of the county court judge, which could only be relevant in the sense that it might lead to a reduction of the amount awarded below the maximum. The county court judge is not directed so to reduce the amount, but he is invited to consider the relative amounts of the earnings at the two periods from the standpoint that the proportion of the maximum to be awarded may require adjustment with reference thereto. Here the county court judge seems to me simply to have acted on a general rule of practice which he has laid down for himself. For these reasons I think the case must be remitted to him for reconsideration.

MATHEW L.J. I am of the same opinion. I think that the meaning of the directions contained in Sched. I., clause 2, of the Act is plain. The county court judge is thereby directed to consider the relative amounts of the workman's weekly earnings before and after the accident, obviously for the purpose of ascertaining whether an amount short of the maximum should be awarded by way of compensation. I agree that the county court judge is not necessarily bound to fix the amount with reference to the difference between the

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workman's earnings at the two periods. He may think, for example, that, though the workman may at the time be earning a certain amount after the accident, he has received serious injury of a permanent kind, and is not likely to continue to earn that average amount. But the comparison of the earnings at the two periods is clearly an element which the judge is bound to consider in relation to the circumstances of the particular case; and I think the principle upon which the county court judge has acted in this case is quite wrong.

COZENS-HARDY L.J. concurred.

Appeal allowed.

Solicitor for applicant: *W. H. Scott, Bradford.*
Solicitors for respondents: *Wynne-Baxter & Keeble.*

E. L.

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[IN THE COURT OF APPEAL.]

McCABE *v.* JOPLING AND PALMER'S TRAVELLING CRADLE, LIMITED.

Employer and Workman—Workman's Compensation—Repair of a Building—Scaffolding, Sub-contract for—Indemnity—Liability of Sub-contractor—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *ss.* 4, 7.

The contractor for the repair of a building over thirty feet in height entered into a sub-contract with another person for the supply and erection of a scaffolding for the purpose of the work and its subsequent removal. A workman in the employ of the sub-contractor, while engaged in the removal of the scaffolding, met with an accident which caused his death. His dependants having recovered compensation under s. 4 of the Workmen's Compensation Act, 1897, against the principal contractor:—

Held, that the latter was entitled to indemnity against the sub-contractor under that section on the ground that he was the "undertaker" in respect of an essential portion of the work of repair.

APPEAL from an award under the Workmen's Compensation Act, 1897, by the judge of the City of London Court as after mentioned.

It appeared that the respondent (1), one Jopling, who was a builder, had contracted to paint the exterior of two houses, which were over thirty feet in height, for the sum of 159*l*. For the purpose of carrying out this contract he had contracted with the appellants (1), Palmer's Travelling Cradle, Limited, for the supply, fixing, and subsequent removal of four travelling cradles for the sum of 23*l*. The nature of these cradles and the manner in which they were fixed were in substance as follows. The cradles were six feet six inches long and twenty inches wide, and had rails three feet high on each side. On the roofs of the houses were fixed timber structures consisting of jibs six feet long lashed with a ledger twenty-two feet long, and fastened with wire ropes to the building, and also to heavy weights. Between the jibs was fixed a horizontal wire rope from which depended ropes supporting the cradles. These ropes worked on pulleys, by means of which the men engaged in the work of painting could raise or lower the cradle as required, and by means of guy-ropes the cradle could be moved laterally. The position of the whole apparatus could be shifted from time to time in order to reach a different part of the building, and the work of doing this when necessary was included in the appellants' contract. Jopling did the actual work of painting by his own workmen. After the painting was completed, the appellants proceeded to remove the cradles and apparatus in connection with them. While engaged in carrying out this process, one McCabe, a workman in the appellants' employ, fell off the roof of the building, and was killed. On a claim for compensation under the Workmen's Compensation Act, 1897, by his dependants against the respondent Jopling and the appellants, Judge Lumley Smith, K.C., of the City of London Court, found that the houses were being repaired by means of a scaffolding, and that the removal of the scaffolding was a substantial part of the process of repairing them, and, this part having been undertaken by the appellants, they were "undertakers" within the meaning of the Act. He made an award of compensation against the

(1) The terms "appellants" and "respondent" are used in this report with reference to the position of the parties in the Court of Appeal.

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respondent Jopling, under s. 4 of the Act, and held that the appellants were liable to indemnify him under the proviso to that section.

S. T. Evans, *K.C.*, and *Minton-Senhouse*, for the appellants. The appellants can only be liable to indemnify the respondent under s. 4 of the Act, if they are liable independently of that section, as being undertakers of some substantial part of the work of repair which the respondent had contracted to do. All that they did was to supply him with certain plant for the purpose of carrying out the work of painting which he had undertaken. They did not perform any part of the work of repair, i.e., the painting. If a man were to let out ladders to another for the purpose of painting a house, it could not be said that the letter out of the ladders took any part in the work of painting. The present case stands on the same footing in point of principle. Suppose a man supplied a mortar-mill to a builder for the purpose of mixing mortar to be used in the erection of a building, or supplied a steam-crane to be used on the ground in the process of building: could it be said in either of those cases that he took part in the process of building, and therefore was an undertaker in respect thereof? The case falls within the principle of the decision in *Percival* v. *Garner*. (1) In order to be an "undertaker" in respect of a building, a sub-contractor must undertake a substantial part of the process of construction, repair, or demolition; and it has never been held in any case that a person who did not undertake any part of the actual work of construction, repair, or demolition was such an undertaker. In *Frid* v. *Fenton* (2) the removal of the scaffolding was being carried out by the same person who had undertaken the actual work of construction, and it may be that in that case the whole work may perhaps fairly be looked upon as an entirety, but the same considerations do not apply to the present case.

[They also cited *Cooper & Crane* v. *Wright* (3); *Stuart* v. *Nixon* (4); *Mason* v. *Dean*. (5)]

(1) [1900] 2 Q. B. 406.
(2) (1900) 69 L. J. (Q.B.) 436.
(3) [1902] A. C. 302.
(4) [1901] A. C. 79.
(5) [1900] 1 Q. B. 770.

Ruegg, K.C., and *Douglas M. Hogg*, for the respondent. It is not disputed that these cradles and the apparatus connected therewith constitute scaffolding. The work contemplated by the Act is construction or repair of a building by means of a scaffolding. That being so, it is impossible to contend that the supply and erection of the scaffolding, and its subsequent removal, are not a substantial part of the work. The learned judge of the City of London Court has so found as a fact, and it is submitted that there is abundant evidence to support his finding. There is no analogy between this case and one of a contract for the mere supply of materials, or of loose plant, which is to be fixed and removed by the contractor to whom it is hired. The work of painting the houses could not be done without some kind of scaffolding, and it is the fact that scaffolding is used which brings the case within the Act. It would be most anomalous, if the sub-contractor, who supplies and fixes the very thing which brings the work within the Act, and without which the repair could not take place, could say as against the principal contractor, who has become liable by reason of it, that the work which he so did formed no part of the work of repair. It cannot be disputed that, if the respondent Jopling had himself erected a scaffolding for the purposes of the work, the removal of it afterwards would have been part of the work of repair: see *Frid* v. *Fenton*. (1) It cannot be that, because, instead of erecting a scaffolding himself, he enters into a sub-contract with the appellants to erect and remove a scaffolding, the erection and removal of it in that case are not part of the work. Assuming that the erection and removal of these cradles was part of the work of repair, it is submitted that it was a substantial part of it. The judge has found that it was, and the evidence supports his finding. Having regard to the fact that the contract price of the whole work was only 159*l*., it cannot be said that work the price of which was 23*l*. bore so small a proportion to the whole as to be unsubstantial. But it is submitted that the expression "substantial" as used in some of the cases, such as *Cooper & Crane* v. *Wright* (2), is really not intended to express

(1) 69 L. J. (Q.B.) 436. (2) [1902] A. C. 302.

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a quantitative relation to the entire work, but is really used by way of an antithesis to the expression "ancillary or incidental to" found in the last paragraph of s. 4 of the Act.

Stuart Bevan, for the applicants.

S. T. Evans, K.C., in reply.

COLLINS M.R. This is an appeal from the judge of the City of London Court, who has held that Jopling, against whom he decided in favour of the applicants, had a right to indemnity against the appellants, Palmer's Travelling Cradle, Limited. It cannot be disputed since the decision in *Cooper & Crane* v. *Wright* (1) that a sub-contractor may be an "undertaker" within the meaning of the Workmen's Compensation Act, 1897; and, if he is, and the contractor, who is the original "undertaker" of the whole work, is compelled to make compensation to a workman of the sub-contractor under s. 4 of the Act, that section gives to the contractor a right to be indemnified by the sub-contractor. It was contended in this case on behalf of the appellants that, having regard to the nature of the particular work which they had contracted to do, they could not be regarded as "undertakers" within the meaning of the Act. The work undertaken by Jopling was the repairing of a building by painting it. It has been held in the case of *Dredge* v. *Conway, Jones & Co.* (2) that painting or whitewashing is repair within the meaning of s. 7 of the Act, which (inter alia) provides that the Act shall apply to employment on, in, or about any building which exceeds thirty feet in height, and is being constructed or repaired by means of a scaffolding, or is being demolished; and that, in the case of a building, "undertakers" shall mean the persons undertaking the construction, repair, or demolition.

In order to carry out the work undertaken by him, Jopling entered into a sub-contract with the appellants by which, in consideration of 23*l.*, they were to provide and put up cradles for the purpose of enabling Jopling's workmen to paint the building, and to remove them when the work was done. The apparatus provided by the appellants appears to be, in

(1) [1902] A. C. 302. (2) [1901] 2 K. B. 42.

substance, scaffolding of a special kind. It seems to be a substantial structure, consisting of poles fastened to and projecting from the roof, with a wire rope running between them, from which depend ropes supporting the cradles, which are capable by means of ropes and pulleys of being raised or lowered, and of being moved laterally. The work of painting having been finished, it was part of the work which the appellants had undertaken to do under their sub-contract to remove these cradles. During the process of removal the accident happened, in respect of which compensation is claimed.

It was contended for the appellants that the removal of the cradles formed no part of the process of repairing, i.e., painting the building, and, therefore, the appellants were not "undertakers" within the meaning of s. 7, and so were not liable to indemnify Jopling under s. 4 of the Act. It is clear that the workman in this case was killed by an accident arising out of and in the course of his employment, and that Jopling had no defence to the claim, and was bound to make compensation under s. 4 of the Act. It would be a strange thing, if it could be maintained by the sub-contractor that, though the workman was entitled to compensation against the contractor, because he had met with an accident while engaged in repairing a building, he nevertheless, as between his actual employer, the sub-contractor, and the contractor, was not, when the accident happened, employed in the repair of that building. As I have already said, the decision in *Cooper & Crane* v. *Wright* (1) has established that the fact that a man is a sub-contractor does not prevent him from being an "undertaker," and therefore liable under the Act, independently of s. 4, if he is a contractor for work of the character to which the Act applies; and, if he is such an undertaker, it follows that he is liable to indemnify the principal contractor under the proviso to that section. Now it appears to me that, having regard to modern methods, it is impossible to say that persons contributing to the performance of the work of repair contemplated by the statute as the appellants did in the present case are not sub-contractors for an essential part of the work. That work could not have been carried on

(1) [1902] A. C. 302.

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without scaffolding of some sort, and it has been held in this Court in the case of *Frid* v. *Fenton* (1) that in such a case the work of repair is not completed until the scaffolding is removed. The work of repair therefore includes the erection of a scaffolding, and, being there, the scaffolding necessarily has to be removed when the work is done. Can it be said that, because, instead of erecting and removing the cradles himself, Jopling sub-contracted with the appellants for that part of the work, the removal of the cradles formed no part of the work of repair, and was therefore not within the Act? That would be a very extraordinary result. So far as the matter is one of fact, the learned judge of the City of London Court has cleared the way by finding that the building was being repaired by means of a scaffolding, and that the removal of the scaffolding was a substantial part of the process of repair. If the matter is one of fact, those findings decide the case. It is argued that the question is one of law, namely, whether a part of the work contracted for which does not involve actual repair can be part of the process of repair so as to constitute the contractor for the performance of it an undertaker within the meaning of s. 7, sub-s. 2. I cannot say that work which is essential to the process of repair is not part of it for this purpose. If a scaffolding had been erected by Jopling himself for the performance of the work of repair, he could not have said that the removal of it, after the painting was done, was not an essential part of the process of repair. It is none the less an essential part of that process, because, instead of doing it himself, he employs a sub-contractor to do it. It might as well be said that a workman employed in keeping steady a ladder, on which another workman stood while painting, or executing some other work of repair, was not himself engaged in the work of repair. A person who undertakes the fixing and removal of a structure which is essential to the work of painting is as much engaged in the work of repair as the person who undertakes the painting itself.

I do not think that anything would be gained by going through all the cases which have been cited, but I wish to say

(1) 69 L. J. (Q.B.) 436.

a word or two with regard to the use that has been made of the word "substantial" in connection with this subject. It has been said that, in order that the sub-contractor should be an "undertaker," the part undertaken by him must be a substantial part of the work of construction, repair, or demolition. But it should be observed that the expression "substantial" does not occur in the Act; and Lord Davey pointed out in *Cooper & Crane* v. *Wright* (1) that it is quite immaterial what the extent or nature of the employer's contract may be provided the work on which the injured workman is employed is within the Act. Of course the rule that de minimis non curat lex may be applicable in such cases, but I think that the reason why the word "substantial" has been introduced in these cases is to be found in s. 4 of the Act, which provides that the section shall not apply where the work provided for by the sub-contract is "merely ancillary or incidental to, and is no part of or process in the trade or business carried on by such undertakers respectively." It seems to me probable that the word "substantial" has been used in this connection as indicating the distinction between work that is part of the work undertaken and work that is merely ancillary or incidental thereto. That distinction has no place in the present discussion, because the particular work here done by the sub-contractors was only a special department of the work done by the undertakers, and it could not be said to be no part of, or process in, their trade or business. In this case it would be enough to say that, even if it were necessary that the work contracted for by the appellants should be a substantial proportion of the total operation contracted for by Jopling, the judge has found, and the evidence, I think, supports his finding, that the operation of removing the scaffolding was a substantial part of the process of repair. I thought it, however, desirable to make these remarks with regard to the use of the word "substantial" to prevent confusion, and to guard against the notion that work essential to the process of construction or repair of a building could not be said to be part of that process, because it was not on a very

(1) [1902] A. C. 302.

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large scale. For the reasons which I have given I think this appeal must be dismissed.

MATHEW L.J. I am of the same opinion. The argument for the respondent is that the work contracted for by the appellants was really a part of the process of repairing the building exclusively undertaken by them. It was said on the other hand that the case was not one of a sub-contractor taking part in the work of repair, but was analogous to that of a sub-contract for the supply of materials; and therefore the principle of the decision in *Percival* v. *Garner* (1) applied. In that case an employer supplied labour for brick-work to a firm engaged in building operations, and it was held that he was not an undertaker within the Act. The appellants' counsel likened these cradles and the apparatus connected with them to a ladder used for the purpose of repairing a house, and argued that the appellants could not be said to take part in the work of repair any more than a person who merely hired out a ladder to a builder for the purposes of such work. I do not think the analogy so suggested is sound, having regard to the nature of the sub-contract entered into by the appellants in this case. The apparatus provided by them appears to have been of this kind. Instead of the ordinary kind of scaffolding —in the case of which upright poles are fixed in the ground, and horizontal poles are lashed across them, on which boards are placed—horizontal poles or supports of some kind are fixed on the roof, from which are suspended cradles, capable of being shifted upwards or downwards or laterally for the purposes of the work; and when it is necessary the position of the whole apparatus can be shifted. The appellants undertook to provide and fix the apparatus, to shift its position when necessary, and finally to remove it when the painting was done. The question is whether the work which they so undertook was part of the process of repair. The learned judge of the City of London Court has found that the building was being repaired by means of a scaffolding, and that the removal of that scaffolding was a substantial part of the process of repairing, and by

(1) [1900] 2 Q. B. 406.

those findings we are, I think, bound. But, apart from those findings, if the question is one of law for us, I do not hesitate to say that in my opinion the erection and removal of these cradles was an essential part of the work of repair, which had been contracted for by Jopling; and therefore the case comes within the authority of the decision of the House of Lords in *Cooper & Crane* v. *Wright*. (1)

Cozens-Hardy L.J. I am of the same opinion for the same reasons, and I only wish to add a very few words. It is said that the Act does not make everybody who supplies things without which repairs of buildings could not be carried out undertakers of the repairs. I agree. I do not think that a person who contracts to supply bricks or paint for the work of repair can be said to be an undertaker. The mere supply of materials or loose plant cannot bring the person who supplies them within the meaning of the word "undertaker" in the Act. But the work of painting in this case was only brought within s. 7 of the Act, because it was being done by means of scaffolding which the appellants had supplied. The argument, therefore, is that, though this apparatus is a matter which was essential to the work coming within the Act at all, yet it can be said that the supply and removal of it are not an essential part of the work of repair so as to constitute the relation of undertaker and workman within the meaning of the Act. I cannot regard this case as analogous to one of the mere supply of labour or materials for the work of repair. It seems to me that this case is well within the line, and that it would not be desirable now to discuss other cases nearer to it which have been suggested in argument.

Appeal dismissed.

Solicitors for applicants: *Sole, Turner & Knight.*

Solicitors for Palmer's Travelling Cradle, Limited: *Wynne-Baxter & Keeble.*

Solicitors for Jopling: *Cooper & Bake.*

(1) [1902] A. C. 302.

C. A. [IN THE COURT OF APPEAL.]

1903

Dec. 16.

CROWTHER *v.* WEST RIDING WINDOW CLEANING COMPANY.

Employer and Workman—Workmen's Compensation—"Scaffolding"—Ladder —Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 1.

Where, during the operation of whitewashing a building, workmen used a ladder by placing it against a wall, and standing or sitting on the rungs of it for the purpose of applying the whitewash, and a county court judge found, on a claim for compensation under the Workmen's Compensation Act, 1897, that the ladder so used was not a scaffolding within the meaning of the 7th section of the Act:—

Held, that it was impossible to say as a matter of law that the ladder must be a scaffolding within the meaning of the Act, and therefore the Court was bound by the finding of the county court judge.

Appeal from the refusal of the judge of the Bradford County Court to award compensation under the Workmen's Compensation Act, 1897, to the appellant.

The appellant was in the employ of the respondents, who had undertaken to whitewash the interior of a wool-combing shed over thirty feet in height, and he had been injured while engaged in that operation by some of the whitewash getting into his eye. The sole question raised was whether, at the time of the accident, the shed in question was being repaired by means of a scaffolding. It appeared that the work was being done by two workmen, of whom the appellant was one. The whitewash was applied by means of a pump, with which was connected flexible piping with a nozzle at the end, one of the workmen working the pump, while the other directed the nozzle. There was a ladder in the shed, which the men used for the purpose of the work, by placing it against the wall, and standing or sitting on the rungs of it for the purpose of directing the nozzle to the higher parts of the shed. The county court judge found as a fact that the shed was not being repaired by means of a scaffolding.

J. J. Wright, for the appellant. It is clear that whitewashing a building is repair within the meaning of the Workmen's Compensation Act, 1897: *Hoddinott* v. *Newton, Chambers & Co.* (1) It is also clear from that decision that the word "scaffolding" in the Workmen's Compensation Act, 1897, covers more than "scaffolding" of the ordinary kind, and may include any other apparatus or device used for the same purpose as scaffolding in the repair of a building. It is submitted that the ladder in this case, being used, not merely for the purpose of ascent or descent, but as a platform for the purpose of repairing a building, was a scaffolding within the Act: *Veazey* v. *Chattle*. (2) In *Marshall* v. *Rudeforth* (3) the ladder appears to have been used merely as a ladder—namely, for the purpose of ascent or descent.

Compston, for the respondents, was not called upon to argue.

COLLINS M.R. This is an appeal from a county court judge who, as I understand his decision, has found as a matter of fact that a ladder was not a scaffolding within the meaning of the Workmen's Compensation Act, 1897. We have no jurisdiction to interfere with that finding, if there was evidence to support it. Therefore the learned counsel for the appellant was really driven to contend that a ladder, used for a purpose for which scaffolding might be used, as it was in the present case, must as a matter of law be a scaffolding. I am not prepared to differ from the learned county court judge, or to say that in point of law a ladder so used must necessarily be a scaffolding. As I have previously pointed out, the point of view, from which the question what constitutes scaffolding must be regarded, has been considerably altered by the decision of the House of Lords in *Hoddinott* v. *Newton, Chambers & Co.* (1); and, having regard to that decision, I do not feel disposed to lay it down as a matter of law that a ladder could not under any circumstances be a scaffolding; but that is a very different thing from saying that a finding by a county

(1) [1901] A. C. 49. (2) [1901] 2 K. B. 494.
(3) [1902] 2 K. B. 175.

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court judge that a ladder is not a scaffolding in any particular case must necessarily be wrong in point of law.

MATHEW L.J. I am of the same opinion. The county court judge has found as a fact that the ladder in this case was a ladder, and nothing more; and it appears to me that the evidence supports that finding. The ladder in this case, no doubt, was used, not merely as a means of ascending or descending, but in a way in which ladders often are used; and there is nothing, so far as I can see, in the Act to indicate an intention that a ladder so used should thereby be transmuted into a scaffolding. The contention of the appellant's counsel was that a ladder used by a workman for any purpose beyond that of ascending or descending may properly be held to be a scaffolding for the purposes of the Act. I cannot assent to that contention.

COZENS-HARDY L.J. I agree. The argument really involves the proposition that, if a chair or a box is used by a workman to stand upon for the purpose of painting a wall, it is necessarily a scaffolding. That proposition appears to me untenable.

Appeal dismissed.

Solicitors for appellant: *Wrensted & Hind, for W. H. Scott, Bradford.*

Solicitors for respondents: *W. A. Crump & Son, for Neill & Holland, Bradford.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1903
Dec. 18.

SHARMAN *v.* HOLLIDAY & GREENWOOD, LIMITED.

Employer and Workman—Workmen's Compensation—Application to review Weekly Payment—Res Judicata—Change of Circumstances—Workmen's Compensation Act, 1897 (60 & 61 *Vict.* c. 37), *Sched. I., clause* 12.

Upon an application by employers for a review of the weekly sum paid as compensation to a workman in respect of injuries arising from an accident under the Workmen's Compensation Act, 1897, the county court judge, acting on the opinion of medical experts that the workman was not incapacitated for work, made an award, ordering the weekly payment to be reduced to a nominal amount. On an application for further review of the payment by the workman, evidence was tendered to shew that, since the previous hearing, he had repeatedly applied for employment, and had been unable to obtain it on account of his condition arising from the accident. The county court judge refused to entertain the application on the ground that the condition of the workman was res judicata, and that there had been no change of circumstances since the previous hearing, so as to give him jurisdiction to review the payment:—

Held, that the doctrine of res judicata did not apply to the decision of the county court judge on the previous hearing, and that, there apparently being evidence of a change of circumstances, he ought to entertain the application.

Crossfield & Sons v. *Tanian*, [1900] 2 Q. B. 629, distinguished.

APPEAL from a decision of the judge of the Lambeth County Court on an application under the Workmen's Compensation Act, 1897.

The applicant was a workman who, while in the respondents' employ, had met with an accident arising out of and in the course of his employment, by which his leg was broken, and he was for the time totally incapacitated for work. A memorandum of agreement was filed in the county court, by which the respondents agreed to make to the applicant a weekly payment of 15*s.* during his incapacity for work. Some time after the respondents applied to the county court judge for a review of the weekly payment on the ground that the applicant's incapacity for work had ceased. At the hearing of

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that application medical evidence was called for both sides on the question whether the injury had or had not resulted in such a condition of the bones of the man's leg as to incapacitate him for work in future; and the county court judge ultimately reduced the weekly payment to a nominal amount in accordance with the practice adopted in *Pomphrey* v. *Southwark Press*. (1) In so deciding, he said, in substance, that the case was a very serious one, the question being really whether the applicant's claim was fraudulent or not; that the case was a difficult one, but he thought that he was bound to come to the conclusion on the weight of the medical evidence that he should reduce the amount to the nominal sum of 1*d*. per week; but that the door was still open for the applicant to come again. Subsequently, the applicant applied for a further review of the weekly payment on the ground that he had, since the previous hearing, sought work from several employers, and been refused on the ground that he was not able to do it on account of the state of his leg, and also that on one occasion, on which he had been able to get work, he was subsequently discharged as being incapable of doing it on account of his condition. It was arranged that, to save the expense of bringing further evidence, which possibly might be thrown away, the counsel for both parties should attend before the county court judge, in order that the applicant might formulate the grounds on which a further review was asked for, and the judge might decide whether primâ facie they afforded any sufficient ground for reopening the case. At this preliminary hearing the counsel for the applicant stated that his grounds for asking for a review were: "(1.) the fact that the applicant has been refused employment repeatedly, even by his former masters, on account of the condition of his foot; (2.) the fact that the county court judge did not decide the case at the hearing solely on the medical evidence, but partly on his personal observation of the applicant's movements; and that the highest expert medical evidence, on new observation and tests of the condition of the applicant, is now tendered to shew that the applicant is unfit to follow his usual

(1) [1901] 1 K. B. 86.

employment; (3.) the fact that the learned judge kept the arbitration alive by awarding 1*d.* weekly in view of a change in the circumstances, and that, the arbitration being so kept alive, it cannot be res judicata; (4.) the fact that the applicant does not seek for a fresh award, but for a review of the weekly payment." The county court judge held that, as he had decided on the previous occasion that the applicant's earning powers were not at that time diminished, and as the present application was again on the ground of total incapacity, the matter was res judicata, and that there was no evidence tendered of any change of circumstances since the previous hearing. He therefore dismissed the application.

Bray, K.C., and *W. M. Thompson*, for the applicant. It is submitted that the matter was not res judicata. The county court judge clearly has never finally decided the question as to the applicant's condition. The course which he pursued at the first hearing plainly shews that the case was still kept open. The issue then, in substance, was whether the applicant was shamming, and what the judge said shews that he did not intend finally to decide that issue. The fact that the applicant was by subsequent experiment proved to be incapacitated is a change of circumstances justifying a further review of the payment.

Shakespeare, for the respondents. The case of *Crossfield & Sons* v. *Tanian* (1) shews that there cannot be a review of the original compensation, unless there is a change in the circumstances. What was contemplated by clause 12 of Sched. I. of the Workmen's Compensation Act, 1897, was that the workman's condition might alter for better or worse after the original award, and that the compensation should be altered accordingly. In this case there is no suggestion that the condition of the applicant has altered since the original hearing. At that hearing the issue fought, and determined, was whether the applicant was totally incapacitated for work; and the county court judge decided that he was not. That issue, therefore, is res judicata. The sole question now raised

(1) [1900] 2 Q. B. 629.

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is whether the decision of the county court judge on that occasion was right or wrong. It is suggested that subsequent experiment has shewn that it was wrong. But that is not a change of circumstances which would justify a review of the payment.

Bray, K.C., was not called upon to reply.

COLLINS M.R. This is an appeal from the decision of a county court judge under the Workmen's Compensation Act, 1897. Acting under clause 12 of Sched. I. of that Act, the judge declined to award to a workman compensation to a greater amount than 1*d.* a week, but at the same time, by adopting that course, kept seisin of the matter. On a later occasion, when the matter was brought before him again, on an application by the workman to have the weekly payment reviewed, he held, on the authority of *Crossfield & Sons* v. *Tanian* (1), that he could not accede to the application, because there was no evidence of any change in the circumstances of the case. The question is whether, under such circumstances as existed here, the decision of the county court judge on the first occasion must govern the position of the parties for all time. Now, in the first place, I have grave doubts whether the doctrine of estoppel by judgment ought to be extended to a case of this kind, where the decision of the county court judge on the first occasion was on a matter which was merely one of opinion, namely, whether the workman was in such a condition at a particular time as to be incapacitated from working in future. It may be a question which in many cases can only be conclusively decided by experiment, and in such a case, until it is so decided, the clearest opinion on that question on the part of the judge is founded merely on the evidence of experts, which may be displaced by the test of subsequent experiment. I can conceive a case in which the opinion of medical experts might be unanimous to the effect that a workman was capable of doing certain work, and yet, afterwards, upon his attempting to do it, he might find it impossible. Under such circumstances ought the doctrine

(1) [1900] 2 Q. B. 629.

of res judicata to apply in these cases, and the decision arrived at upon the evidence of experts to stand incontrovertible for ever? I do not think that such a subject-matter is one to which the doctrine of estoppel by judgment ought to be applied. The decision in *Crossfield & Sons* v. *Tanian* (1) is no authority for the application of that doctrine in such a case as the present. The particular matter decided in that case was not a matter of opinion or of expert evidence at all. There the original award was made by the county court judge on the basis that the average weekly wages of the workman before the accident were 30*s*., as he himself alleged, the employers having been precluded from shewing that his earnings had really been less, because they had neglected to take certain steps, which it was incumbent upon them to take under the rules, in order to put themselves in a position to negative the allegations made by the workman on the subject in his request for arbitration. There was no appeal against the award, but, subsequently, the employers applied for a review of the weekly payment on the ground, really, that they had not been able to set up the true facts at the hearing. It was held that they had estopped themselves from asserting as against the workman that his average weekly wages had not been 30*s*., and the award on that basis was conclusive; and that, there having been no change of circumstances since the original award, the application to review the weekly payment must be refused. That was not the case of an application to review the weekly payment on evidence of actual subsequent experience, disproving the correctness of mere speculative opinion. Here the application appears to be on the ground that evidence is now forthcoming to prove that, by subsequent experiment, the decision based on the speculative opinion of medical experts has been shewn to be erroneous. I am not prepared under the circumstances to say that there may not in this case be a change of circumstances, within the meaning of that phrase as used in *Crossfield & Sons* v. *Tanian* (1), which would justify an application for a review of the weekly payment. The decision in that case must be looked at with

(1) [1900] 2 Q. B. 629.

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reference to the facts on which it was based. I should be sorry to think that it was an authority for saying that, in a case of this kind, where subsequent experience has shewn that the decision of a county court judge based on the opinion of medical experts was wrong, it is impossible that it can be reviewed, on the ground that the workman's condition is really the same as it was at the time of the original decision. If that were so, it appears to me that great injustice might be caused. I can find nothing in the express terms of the Act itself to justify that conclusion, and I do not think, when the case of *Crossfield & Sons* v. *Tanian* (1) is examined, it is an authority for any such proposition. I think that there is a change of circumstances where subsequent experiment has shewn that the previous opinion based on expert evidence was wrong. It seems to me that the grounds for review formulated before the county court judge by the applicant's counsel, particularly with reference to the repeated failure of the applicant to obtain work through his incapacity to do it, point to the existence of evidence which would amount to such a change of circumstances as to let in the jurisdiction of the county court judge under clause 12 of Sched. I. of the Act, and to justify a review of the weekly payment under that clause. For these reasons I think the appeal must be allowed, and the case must go back to the county court judge that he may deal with it on the fresh evidence which is tendered.

MATHEW L.J. I am of the same opinion. The doctrine of res judicata is reasonably applied in cases where there has been a formal inquiry upon some issue distinctly raised in an action or other such legal proceeding as to the existence of a disputed fact; but I do not think it would be reasonable to apply that doctrine as suggested to an inquiry of this kind. The condition of the workman's health at the time of the original award is in such a case as this a subject of medical opinion and speculation, and ought not in reason to be treated as conclusively determined for the purposes of the Workmen's Compensation Act, 1897, Sched. I., clause 12, by the decision of

(1) [1900] 2 Q. B. 629.

the county court judge on the original hearing, as if it were a disputed fact which, upon conflicting evidence, had been determined on the trial of an action. The position taken up by the respondents' counsel was that, although symptoms should develop after the original inquiry, clearly traceable to the accident, but which were not before observed, nevertheless the doctrine of res judicata applies, and there can be no further inquiry. I can see nothing in the Act itself which forbids further inquiry if, after the original inquiry, fresh symptoms develop or further incapacity for work is shewn to have arisen. The expert witnesses on the side of an employer may be of opinion that, having regard to the symptoms then appearing, the condition of the workman is not such as to incapacitate him in future for work, and the county court judge may decide accordingly; but, if the workman afterwards solves the question by experiment, and, on his endeavouring to obtain employment, the result proves clearly that he is incapacitated, there seems to me to be no good reason why the county court judge should be prevented from going into the matter again and reviewing the award. It would, in my opinion, be most unjust if in such a case the doctrine of res judicata should prevent the injured workman from applying for adequate compensation.

There is another ground on which I think the applicant is entitled to complain of the decision of the county court judge. The issue raised on the first inquiry was really a most formidable one. The evidence of the medical witnesses for the respondents was to the effect that the applicant was shamming, although they may not have said so in terms. There could not be a more serious issue. How did the judge deal with it? Did he deal with it on that occasion in a way which shews that he intended to make the condition of the applicant res judicata, so far as he was concerned? He said that the case was a difficult one; that he thought that, upon the weight of the medical evidence, he must reduce the weekly payment to 1*d.*, but that the door would be open for the applicant to apply again. I cannot think that, in dealing with the case as he did, the learned judge could have meant

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to determine the issue whether the applicant's claim was fraudulent conclusively against him. On this ground it appears to me clear that, apart from the general question, whether the doctrine of estoppel would apply in such a case, this particular case must go back to the judge in order that he may hear the application for a review of the compensation.

COZENS-HARDY L.J. I agree.

Appeal allowed.

Solicitors for appellant: *Griffith & Gardiner.*
Solicitors for respondents: *William Hurd & Son.*

E. L.

C. A. 1903 *Dec.* 16, 19.

[IN THE COURT OF APPEAL.]

BENSON *v.* LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

Employer and Workman—Workman's Compensation—Accident arising out of and in the course of the Employment—Workman going to work—Workmen's Compensation Act, 1897 (60 & 61 *Vict.* c. 37), *s.* 1, *sub-s.* 1.

An engine driver in the employ of a railway company had, in order to commence his day's work, to go in the morning to the company's engine shed. His proper route to the engine shed was through a gate opening from the public road on to the railway, and thence by a pathway which did not cross the rails. One morning, on getting through the gate, instead of going along the pathway towards the engine shed, he went in the opposite direction along the railway to a signal-box, which stood in the middle of the line with rails on both sides of it, in order to get some information from the signalman for his own purposes. After obtaining the information which he required, he proceeded from the signal-box towards the engine shed along the railway. Some time afterwards he was found lying on the line seriously injured, having presumably been run down by an engine, and he subsequently died of his injuries. On a claim for compensation by his dependants against the company under the Workmen's Compensation Act, 1897:—

Held, that the accident could not be said to have arisen out of and in the course of the deceased man's employment, and therefore the claim for compensation must fail.

APPEAL from the decision of the judge of the Blackpool County Court upon a claim for compensation under the

Workmen's Compensation Act, 1897, by the dependants of a workman employed by the respondents (1), who had been killed by an accident on their railway.

The deceased man had been employed by the respondents, the Lancashire and Yorkshire Railway Company, as an engine driver. He had, in order to commence his day's work, to go to an engine shed of the respondents, where his engine was, at 7.45 A.M., and to "sign on" there. He lived in a road called Rigby Road, between a quarter of a mile and half a mile from the engine shed, and his proper way there was to go along that road to a gate which gave access to the railway, and on getting through that gate to proceed along a pathway to the left by the side of the line, which led to the engine shed without crossing over the rails. It appeared that, previously to the date of the accident, some complaint had been made against him on account of a train driven by him having been late, and he had been called upon to make a report with regard to the matter. On the morning of the day on which the accident happened, he started from his home in Rigby Road at about 6 A.M., and proceeded to the before-mentioned gate. On getting through the gate, instead of turning to the left and going to the engine shed, he went in the opposite direction along the railway to a signal-box, which stood in the middle of the line with sets of rails on both sides of it, for the purpose of making inquiry of the signalman as to the precise time when the train driven by him, in respect of which the complaint was made against him, had passed the signal-box. It appeared that the signalmen did frequently in such cases give information to engine drivers in order to oblige them, but that it was no part of their duty to do so. Having obtained the information which he required, the deceased man left the signal-box, and proceeded along the railway towards the engine shed. Rather more than an hour later he was found on the line seriously injured, having apparently been run down by a pilot engine which had passed in the meantime, and he subsequently died from his injuries. The spot where he was found was

(1) The term "respondents" is used in this report in reference to the position of the parties before the county court judge.

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about two-thirds of the distance from the signal-box to the engine shed.

A claim having been made by his dependants against the respondents for compensation under the Workmen's Compensation Act, 1897, at the hearing before the county court judge the respondents contended (inter alia) that the accident had not arisen out of and in the course of the deceased man's employment. In giving the reasons for his decision the judge said: "The last point raised by the respondents, namely, that on the admitted facts the accident was not one arising out of or in the course of the workman's employment, is one of more difficulty. He left home much earlier than was necessary as far as his duties were concerned, in order to make inquiries for his own purposes at the signal-box. He went out of his way and put himself in jeopardy by crossing the lines for this purpose, and, if he had not done so, but had gone direct to his work, no accident would have happened. On the other hand, when the accident happened, he was on the premises of the respondents, he had finished his own business, and was on his way to the engine shed to commence his work. It seems to me a case where one may well hesitate, but on the whole I think that the employment began when he left the signal-box to go to the engine shed, and that therefore the accident was one arising out of and in the course of his employment." The judge accordingly awarded compensation to the applicants.

C. A. Russell, K.C., and *E. Acton*, for the respondents. The evidence shews that the accident to the deceased workman did not arise out of or in the course of his employment. His daily employment began at the engine shed, and his proper route to the shed would have involved him in no risk. It was no part of his duty to the company to go to the signal-box for any purpose. He went there to get information in order to meet a complaint made against him, and not in the course of his duties. The county court judge has found that he went there for his own purposes; but he seems to have thought that, as soon as the deceased man started on his return from the

signal-box to go to the engine shed, he being on the company's premises, it might be said that his employment had commenced. It is submitted that this cannot be so. It cannot be that, because, before going to his work, he goes for his own purposes to some part of the company's premises, not properly on his way to his work, that his employment begins as soon as he leaves that spot to proceed to his work by a route which, although on the company's premises, is not his proper route to his work, and involves risk. This is not like a case where a workman, in order to get to the particular spot where his actual work is to be done, has to pass over some portion of his employer's premises, and, in crossing that part of the premises, does not take the safest possible route, but one which, though it involves some risk, he has not been forbidden to use. Here the man's employment did not begin till he got to the engine shed. Again, this is not like a case in which, the employment for the day having undoubtedly begun, the question arises whether the workman must be considered at the particular moment of the accident to have been engaged in the employment or to have temporarily broken off his work. Here the case really is that, the man's daily employment not having begun, he goes for his own purposes to a dangerous place which is not on the way to his work. It is immaterial that that place is on his employers' premises.

[They cited *Holness* v. *Mackay & Davis* (1); *Smith* v. *Lancashire and Yorkshire Ry. Co.* (2)]

S. T. Evans, K.C., and *Adshead Elliott*, for the applicants. The question when the employment began is really a question of fact, and, the county court judge having found as a fact that it began when the deceased man started from the signal-box to go to the place where he had to sign on, this Court is bound by that finding, if there was evidence to support it. The deceased was proceeding to his work, and, to get to the engine shed, he must go on the respondents' premises. He is within the protection of the Act during his transit over the company's premises to his work, and he does not lose that protection because the route he chooses over those premises is not the

(1) [1899] 2 Q. B. 319. (2) [1899] 1 Q. B. 141.

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very safest one: *Holmes* v. *Great Northern Ry. Co.* (1) It is contended that the employment really began for this purpose as soon as the deceased man entered on the respondents' premises with a view of going to his work; and it is immaterial that he went somewhat out of his way to get some information connected with his duties. Assuming that it was negligent or reckless to do so, it would not deprive him of the protection of the Act, unless it could be said that it was serious and wilful misconduct on his part, which was never suggested here. The information which the deceased went to the signal-box to procure was for the purpose of enabling him to do what he had been directed by his employers to do, namely, make a report as to the matter in respect of which a complaint had been made against him. It was really partly in pursuance of his duty to the company as well as for his own purposes that he went to the signal-box.

[They also cited *Smith* v. *South Normanton Colliery Co.* (2); *Goodlet* v. *Caledonian Ry. Co.* (3); *Tod* v. *Caledonian Ry. Co.* (4); *Pomfret* v. *Lancashire and Yorkshire Ry. Co.* (5)]

C. A. Russell, K.C., in reply. There was no evidence whatever to shew that the respondents invited or authorized the deceased man to go to the signal-box for information. The evidence was that it was no part of the duty of the signalmen to give such information. If, for the purpose of meeting the complaint which had been made against the deceased man, he went to the signal-box to get information, it cannot be said to have been in the course of his employment to do so. It is impossible to contend that, if, before going to his work on the railway on a given morning, a man for his own purposes goes on to any part of the railway, however remote from the actual spot where his work is to begin, he can be said to be engaged in his employment directly he gets upon the employer's premises. If the accident had happened close to the engine shed, a difficult question might arise as to the precise point at which a man might be said to enter on his employment. The signal-

(1) [1900] 2 Q. B. 409.
(2) [1903] 1 K. B. 204.
(3) (1902) 4 F. 986.
(4) [1899] 1 F. 1047.
(5) [1903] 2 K. B. 718.

box in this case cannot possibly be included in any definition of the place where the deceased's work was to commence.

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Cur. adv. vult.

Dec. 19. COLLINS M.R. This is an appeal from the decision of a county court judge upon a claim under the Workmen's Compensation Act, 1897, by the dependants of a deceased workman, who was employed as an engine driver by the respondents, and who met his death by an accident on their railway; and the question is whether, under the circumstances, the respondents are liable to pay compensation in respect of that accident. It appears that the deceased man lived between a quarter of a mile and half a mile away from the engine shed, where the engine which he was to drive on the day of the accident was kept. A complaint appears to have been made against him for having been late on one occasion while driving his engine, and he had been called on to make a report on the subject. On the morning of the day on which the accident happened, he left home considerably earlier than was necessary in order to reach the engine shed where his work was to begin at the time when he was due, namely, 7.45 A.M. His home was in a road called Rigby Road. His proper mode of proceeding to the engine shed was by going along that road to a gate leading on to the railway, and thence by a pathway by the side of the line, which led straight to the engine shed without crossing any of the rails. When he got through the gate, instead of turning to the left along the pathway, he turned to the right, and went to a point further away from the engine shed than the gate, namely, to a signal-box, which stood in the middle of the railway lines with rails on both sides of it. He went to that signal-box, as it appeared, for the purpose of inquiring of the signalman the precise time at which his train passed the box on the day on which he was said to have been late. After having had some conversation with the man in the box, he went straight from there along the lines of railway towards the engine shed. He was found an hour or more later, lying on the four-foot way, seriously

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injured, and he afterwards died from his injuries. He had got rather more than half-way from the signal-box to the engine shed at the time of the accident.

Under these circumstances a claim was made by his dependants for compensation; and the county court judge decided in their favour. He has himself stated his reasons and the conclusions of fact upon which he based his decision. He said that the deceased left his home much earlier than was necessary so far as his duties were concerned to make inquiries for his own purposes at the signal-box; that he went out of his way, and put himself in jeopardy by crossing the lines for this purpose; and that, if he had not done so, no accident would have happened. After arriving at these findings of fact, he then proceeded to say that, on the other hand, when the accident happened, the deceased was on the premises of the respondents, having finished his own business, and was on his way to the engine shed to commence his day's work. The learned judge then said that in his opinion the deceased's employment began when he left the signal-box to go to the shed; and he therefore held that the accident arose out of and in the course of the deceased's employment.

After careful consideration of the evidence and the judge's findings, I find it impossible to agree with his decision that, as a matter of law, the accident arose out of and in the course of the deceased's employment. The judge has found as a fact that the deceased went to the signal-box for his own purposes, by which I understand him to mean, for purposes not incidental to his duties as an engine driver. He went in the opposite direction from the shed in order to go to the signal-box, which involved his crossing the rails, for his own purposes; and, when he left the signal-box to go to the shed, he went by a route which involved the risk of crossing the rails again; and he did all this for the purpose of getting to the point where he was to enter upon his employment for the day, and, until he reached which, that employment would not have begun. It seems to me, with regard to a person who is employed for a certain period, either of the day or night, that, during the period that he is so employed, he is entitled to the

privileges given by the Act; but, from the time when he leaves off work, say, in the evening, until he arrives at the spot where his employment is to commence again next morning, he is in the same position, as regards his employers, as any other member of the public, and is not within the protection of the Act. If he chooses to take a dangerous route to that spot, he takes it at his own risk. On the facts of this case, it appears to me clear that the place where the deceased's employment was to commence on the day in question was the engine shed, and that he had to get there, before his daily employment could be resumed. If he chose to go there by a dangerous route, instead of by the ordinary route, he did so at his own risk, and he had not entered upon his employment again until he got there. The judge has found, in effect, that, for his own purposes, the deceased went out of his way, and put himself in jeopardy, by going across the rails, instead of going by the safe route, to the shed, and but for that the accident would not have happened. One would have thought that on that finding the case would have been concluded in favour of the employers, but the learned judge goes on to give reasons for coming to the contrary conclusion. The fallacy which underlies his reasoning in what he subsequently said appears to me to be that it implies that the deceased's employment began when he left the signal-box. But he clearly had not gone there for the purposes or at the risk of his employers. If he had no business, so far as they were concerned, to go to the signal-box, it cannot be said, in my opinion, that his employment began, and that he was going to the shed at his employers' risk, when he left it. He had not entered on his employment, merely because he had got upon his employers' premises. A railway extends a long way, and a workman employed by the company does not enter upon his employment at any place where on any given morning he chooses to enter on their premises with a view of subsequently going to his work. The place where the deceased had to enter on his employment was the engine shed. It is not necessary for the purposes of the present case to define precisely what is the extent of the area which might be included in the term

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"engine shed"; for it certainly did not extend to the signal-box or to the spot where the deceased was found. It appears to me that the learned county court judge clearly misdirected himself in point of law in treating the deceased's employment as beginning directly he left the signal-box. There is nothing to shew that it began before he reached the place where he had to report himself for work that morning, namely, the engine shed. For these reasons I think the appeal must be allowed.

MATHEW L.J. I am of the same opinion. I think the clear result of the evidence in this case is that the employment of the deceased man for each day was to begin at or about the engine shed. If any other view, such as that of the county court judge, were adopted, the result would appear to be that the employment of a workman in the position of the deceased would begin at any point at which, for his own convenience, on the particular day he chose to enter on the company's premises and cross the rails, with the intention of subsequently going to the engine shed where his work for the day was to commence. Clearly that cannot be so. The deceased may not have been prohibited by the company from going on to the line and crossing the rails as he did, but he did so at his own risk. It was suggested that there was evidence from which the judge ought to have inferred that it was part of the man's employment to go to the signal-box in order to inform himself as to the time at which he passed the box on a previous day for the purpose of making a report to the company. But it does not follow from the fact that the company required him to make a report that they employed him to do so. The judge has found as a fact, and it appears to me rightly, that the man went to the signal-box to get information for his own purposes, and not in pursuance of the directions of the company or as part of his employment. I think that finding disposes of the case. I agree with the Master of the Rolls that it is impossible to treat the transit from the signal-box to the engine shed as in any way forming part of the deceased's employment. With regard to some of the possible

cases suggested by way of illustration during the argument, I wish to say that I do not think that the protection given by the Act can be confined to the time during which a workman is actually engaged in manual labour, and that he would not be protected during the intervals of leisure which may occur in the course of his daily employment. A workman is not a machine, and must be treated as likely to act as workmen ordinarily would during such intervals: and, as regards any reasonable use which, while on the employer's premises, he may make of moments when he is not actually working, I must not be supposed to say that he would be thereby deprived of the protection of the Act. I think that, before the workman can be deprived of that protection during such intervals, there must be some clear deviation by him from his duty under his contract with his employer.

COZENS-HARDY L.J. concurred.

Appeal allowed.

Solicitors for applicant: *Indermaur & Brown, for C. W. Callis, Blackpool.*

Solicitors for respondents: *Woodcock Ryland & Parker, for C. Moorhouse, Manchester.*

E. L.

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Nov. 18;
Dec. 7.

APOLLINARIS COMPANY *v.* NORD DEUTSCHE INSURANCE COMPANY.

Marine Insurance — Policy on Goods — Inland Voyage on River — Goods carried on Deck—Liability of Underwriters.

The plaintiffs insured goods with the defendants against all risks during transit from London to Neuenahr on the Rhine viâ Amsterdam. The goods on arrival at Amsterdam were transhipped on to a Rhine steamer and there stowed on deck for carriage up the river to Neuenahr. While the goods were so stowed on deck a fire broke out on the steamer and the goods were burnt. There was evidence that it was a common practice for Rhine steamers to carry goods on deck :—

Held, that the general rule, which exempts underwriters on cargo from liability for loss of goods carried on deck during a voyage by sea, does not apply to an inland voyage upon a particular river contemplated by the policy, upon which river there is a usage to carry cargoes on deck.

Quære, whether the above general rule applies in any case to an inland voyage upon a river.

Trial before Walton J. without a jury.

The plaintiffs by an open policy for 10,000*l.* dated August 21, 1902, and subscribed by the defendants, effected an insurance upon "corks, bottles, envelopes, mineral waters, and other goods as interest may appear to be hereafter declared and valued . . . . at and from London to Rotterdam $\frac{\text{and}}{\text{or}}$ Antwerp $\frac{\text{and}}{\text{or}}$ Cologne, and while there, and thence by any conveyance or conveyances to Remagen or the Apollinaris Spring, Neuenahr, or by any other route whatsover . . . . including all risks on quays or elsewhere during transit or until warehoused $\frac{\text{and}}{\text{or}}$ safely delivered into the hands of the consignees" against the ordinary perils including fire. The policy included "all liberties and exceptions as per bills of lading." Among the declarations made under the policy and agreed to by the defendants were two, dated January 2 and January 12, 1903, respectively, one being of 100 bales of corks valued at 1376*l.* "per *Maastroom* SS. and conveyances London to Neuenahr viâ Amsterdam," and the other of fifty packages of corks valued at 677*l.* "per *Amstelstroom* SS. and conveyances London to Neuenahr viâ Amsterdam." The said parcels of

corks were shipped on through bills of lading of the Holland Steamship Company to Neuenahr, Germany, but the bills of lading provided that the Holland Steamship Company's responsibility should cease at the port of Amsterdam. The corks duly arrived at Amsterdam, where they were transhipped on board the Rhine steamer *Amsterdam III.*, belonging to the Rhine Steamship Company, for carriage by ship canal to the Rhine and then up the river to Neuenahr. They were stowed principally on deck. On January 17, whilst the *Amsterdam III.*, being then fully loaded, was lying at her moorings at Amsterdam preparatory to starting on her voyage up the Rhine Canal, a fire broke out on board whereby many of the corks were destroyed and others were much damaged. It was proved that it was a matter of common practice for steamers on the Rhine to carry goods of all kinds on deck, though the defendants had no knowledge of this practice. Evidence was given by a Dutch barrister that by the Commercial Code of Holland, art. 348, the shipowner is liable for all damage to goods carried on deck without the written consent of the shipper, even in the case of a voyage upon a river such as the Rhine, and that an allegation of a custom to carry goods on deck would by the law of Holland afford no answer to a claim for loss of deck-laden goods. Most Dutch bills of lading, however, in respect of goods carried upon the Rhine contain the written consent of the shipper to the carriage of the goods on deck. There was no evidence in the present case that the corks were shipped on board the *Amsterdam III.* under any written contract of affreightment. But a copy of the ordinary form of bill of lading in use by the "Society of Amsterdam Rhine Steamer Interests," of which the owners of the *Amsterdam III.* were members, was put in; and there was a clause in that form whereby the steamship companies "reserve themselves the right to load goods on deck without having to inform thereof specially the senders of those goods," and the form contained a space for the "signature of shippers or senders" as well as of the captain. The defendants resisted the plaintiffs' claim for the loss of the corks on the ground that at the time of the loss the goods

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were being carried on deck, and were therefore not covered by the policy.

Hamilton, K.C., and *Loehnis*, for the plaintiffs. As a general rule an underwriter of a policy on goods in the common form is not liable for the loss of goods carried on deck without notice to him that they are going to be so carried, inasmuch as the goods are thereby exposed to more than ordinary risk, and the underwriter ought to be informed of the fact "to enable him to estimate the risk and calculate the premiums": per Lord Lyndhurst C.B., *Blackett* v. *Royal Exchange Assurance Co.* (1) If, however, the goods are so carried "by virtue of a general custom of the particular trade on which the insurance is effected, the underwriter is presumed to be acquainted with such usage without having notice of it, and therefore may fairly be supposed to undertake the risk of their being so carried on deck": Arnould's Marine Insurance, 7th ed. vol. i. s. 225. Here the evidence shews that it was a general usage of the Rhine steamers to carry goods on deck. Further, apart from such evidence of usage, the defendants would be liable in the present case, for the voyage upon which the goods were stowed on deck was not a sea voyage, and the exemption of underwriters from liability for deck-laden goods has never been extended to a voyage on a canal or river. There being no risk of jettison on such a voyage, the goods are not exposed to extraordinary peril by being placed on deck.

Scrutton, K.C., and *Leck*, for the defendants. The general rule as to the exemption of underwriters from liability for loss of goods carried on deck ought to apply as well to carriage by river as to carriage by sea; for though in the former case the position of the goods does not expose them to risk of jettison, it exposes them to greater risk of fire than they would be subject to if carried in the hold.

The practice proved to exist on the Rhine of carrying goods on deck is referable to the fact that they are customarily carried on that river under bills of lading whereby the shipper consents in writing to their being carried on deck, which is not

(1) (1832) 2 C. & J. 244, at p. 250; 37 R. R. 695.

the case here. There is no evidence of a custom on the Rhine to carry on deck with or without the written consent of the shipper. And even if there were, it would be a custom illegal by the law of Holland and therefore void. And the underwriters cannot be presumed to contract with reference to a custom which is void.

Hamilton, K.C., in reply. If in fact it was the custom on the Rhine to carry goods on deck in breach of the contract of carriage, though it may have been a bad custom as between the shipowner and the shipper, the fact of its illegality cannot affect the question as between assurers and assured. The underwriters must be presumed to have contracted with reference to the practice which in fact existed, whether it was good or bad.

Cur. adv. vult.

Dec. 7. WALTON J. delivered the following written judgment:—This is an action upon a marine policy, underwritten by the defendant company, under which the plaintiffs, the Apollinaris Company, Limited, claim to be indemnified against a loss which they have suffered by the destruction or damage by fire of certain bales of corks which were, as the plaintiffs allege, covered by the policy at the time of the loss. The policy was upon corks, bottles, and other goods by steamer or steamers and conveyances, including parcel post, "at and from London to Rotterdam $\frac{\text{and}}{\text{or}}$ Antwerp $\frac{\text{and}}{\text{or}}$ Cologne, and while there, and thence by any conveyance or conveyances to Remagen or the Apollinaris Spring, Neuenahr, or by any other route whatsoever . . . . including all risks on quays or elsewhere during transit or until warehoused $\frac{\text{and}}{\text{or}}$ safely delivered into the hands of the consignees." The corks were shipped in London by steamers belonging to the Holland Steamship Company under through bills of lading, by which the Holland Steamship Company undertook, in consideration of the payment to them of a through freight, to deliver the corks safely at Amsterdam, when the responsibility of the Holland Steamship Company as carriers was to cease, and to have them despatched from Amsterdam to Neuenahr, in Germany, at the expense of the Holland Steamship Company, but at the risk of the shippers,

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the Apollinaris Company. The goods arrived safely at Amsterdam, and were then shipped on board a Rhine steamer, called the *Amsterdam III.*, for carriage by canal and river to Remagen, or some landing-place on the Rhine, whence they would be forwarded to the Apollinaris Spring. There is no evidence before me which enables me to ascertain the contract under which the bales of cork were shipped by the Holland Steamship Company on the *Amsterdam III.* Apparently no bill of lading for these goods was signed by the master or by any person on behalf of the owners of that steamship. A printed form of bill of lading was put in at the trial which appears to be a common form in use for shipments made by the Holland Steamship Company on steamers of the Rhine Steamship Company, who were, as I understand, the owners of the *Amsterdam III.* This form of bill of lading is intended to be signed by the shippers as well as by the master, and bears the printed signature of the Holland Steamship Company as shippers. By the first of its conditions the Rhine Steamship Company reserve to themselves, among other liberties, the right to load goods on deck. But there is no evidence upon which I can find that the corks were shipped upon the terms of this bill of lading. The corks were shipped at some time between January 15 and January 17, 1903. They were stowed on deck with the intention that, so stowed, they should be carried to their destination on the Rhine. On the night of January 17, while the *Amsterdam III.* was still lying at Amsterdam, a fire broke out on board by which some of the bales of corks were destroyed and others damaged. The amount of loss is admitted to have been 1021*l.* 16*s.* 10*d.*

The facts as I have stated them are admitted, and the only defence pleaded by the defendants is that "at the time of the loss the goods were stowed and carried on deck and were not covered by the policy." This case cannot, of course, be disposed of upon any technical point of pleading. But it is not irrelevant to observe that in 1842 the Court of Queen's Bench, in *Milward* v. *Hibbert* (1), held that a plea substantially in the form of the defence here pleaded by the present defendants did

(1) (1842) 3 Q. B. 120, at p. 136; 61 R. R. 155.

not disclose a good defence in an action upon a marine policy for a loss caused by the jettison of deck cargo. The claim there was by the owner of the ship under a policy on the ship for the amount of the ship's contribution in general average in respect of some pigs which were carried on the ship's deck and were jettisoned. The defendant pleaded that the pigs were carried on deck. The plaintiff replied that there was a custom to carry pigs on deck on the voyage upon which the ship was engaged. To this replication the defendant demurred. Although the question arose upon a demurrer to the replication, the judgment of the Court proceeded upon an exception to the validity of the plea, and the Court held that the plea was bad. The technical point actually decided is not important, but the judgment is useful, as it was necessary for the Court from the nature of the question before them to consider the principle upon which the earlier decisions as to the carriage of deck cargo were founded. The judgment was delivered by Lord Denman. After referring to the early authorities to the effect that goods should not be stowed on deck and to a passage in the 5th edition of Lord Tenterden's book on Shipping, p. 355 (1), in which it was pointed out that there are exceptions to the rule, as where usage has sanctioned the practice and where the master has the merchants' consent, the Lord Chief Justice says: "Now it is obvious that there may be other and valid reasons for stowing goods on deck; indeed some goods could be stowed in no other place, such as timber, and in some voyages live animals; and they may certainly be there stowed with proper skill and care so as not to be in the way of the crew in their operations." The Chief Justice was here referring to one of the reasons for forbidding the stowage of cargo on deck which was relied on by Valin and others who wrote at a time when navigation by steam had not been invented. He proceeds: "These matters of fact may vary with every different trade or even with every single adventure," and in conclusion he says that "the mere fact of stowing them (the goods) on deck will not relieve the underwriter from responsibility, inasmuch as they may be placed

(1) And see 14th edition, p. 785.

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there according to the usage of the trade, and so as not to impede the navigation or in any way increase the risk." Without pushing the decision in *Milward* v. *Hibbert* (1) too far, it certainly seems to point to this—that the question whether stowage on deck is improper is strictly and properly a question of fact, and apart from express contract must be decided, whether as between different owners of goods in the same vessel, or as between assured and underwriters, according to the circumstances of each case, having regard especially to the nature of the voyage and of the cargo and to the usages of the trade. It is, however, quite clear from all the authorities upon this question that it is a fact which has long been well recognised by all who are interested in maritime adventures, and by our Courts, that on ordinary voyages by sea goods which are carried on deck are exposed to peculiar and extraordinary danger. It follows from this, for reasons which are closely analogous to those upon which the implied warranty of seaworthiness in contracts of marine insurance depends, that under an ordinary policy on goods for a voyage by sea, where there is no well-known usage to carry on deck goods such as are described in the policy on the voyage thereby insured, underwriters are not liable for the loss of deck cargo. Where from the description of the goods or the voyage, or both, it is apparent that, in accordance with a well-known practice or usage of trade, the goods will or even probably may be carried on deck, then even in the case of voyages by sea, where goods so carried are necessarily exposed to peculiar dangers, still the underwriters will be deemed to have consented to take this risk and will be liable for any loss of deck cargo by perils insured against. The question which arises as to the right to contribution in cases of general average where deck cargo has been jettisoned is very similar to the question between assured and underwriters as to the loss of deck cargo. The questions are not identical, because the obligations in the two cases are different in their nature and origin. But the underlying and governing principle applicable to each is the same. In the ancient collections of customs of the sea, such as the Consolato

(1) 3 Q. B. 120; 61 R. R. 155.

del Mare, and in the earlier Codes, such as the Ordonnance de la Marine of 1681, the question is dealt with in connection with general average. Valin, in his commentary on that article of the Ordonnance which enacts that the owner of deck cargo which has been jettisoned cannot claim contribution in general average, says that it does not apply to boats or small vessels going from port to port where the custom is to load goods on deck as well as below. He is in this passage obviously referring to small coasting craft, sailing vessels, of course, which make short trips from port to port. Emerigon follows Valin and adopts the same exception to the general rule of the Ordonnance. The same view has been recognised in our own Courts. Thus in *Wright* v. *Marwood* (1), in the year 1881, Lord Bramwell, referring to the general rule which requires contribution to be made in general average for cargo jettisoned and to the exception to such rule in the case of deck cargo jettisoned, says: "To this exception, however, there are two exceptions, which perhaps resolve themselves into one—viz., that coasting vessels are without the exception, and also those cases where by custom the deck cargo is one customary in the trade, and perhaps also from the port." The exception of coasting vessels, apart from custom, is intelligible only on the ground that in the short trips made by coasting vessels deck cargo is not exposed to peculiar danger, at all events to an appreciable extent. And when Lord Bramwell says that the two exceptions resolve themselves into one, I think he means that when the voyage is such that the cargo is carried on deck without peculiar risk, it will in practice be so carried whenever it is convenient. I have considered the authorities at some length, and endeavoured to arrive at the principle upon which they rest, because I have to deal with a question which, so far as I know, has not been considered in any reported English case—the question, that is to say, whether there is any such general rule exempting underwriters on cargo from liability for loss of goods stowed on deck upon an inland voyage by canal and river.

As it is well known that there is a great trade upon inland

(1) (1881) 7 Q. B. D. 62, at p. 67.

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waters in the United States of America, I have thought it desirable to look into the American cases. I am afraid that my investigation has not been exhaustive nor quite up to date. The decisions of the American Courts are not of course in any sense binding, but we read them with respect, and they afford useful illustrations. In a case of *Harris* v. *Moody* (1), in the Court of Appeals of the State of New York, I find it was decided that the rule that underwriters are not liable for the loss of deck cargo is not applicable to vessels which navigate smooth land-locked waters—in that case it was Long Island Sound—and where deck cargo can be carried without extraordinary peril. This case is cited as an authority by Parsons in his well-known treatise on Insurance. The American decisions, however, are not altogether uniform. The decision of the Supreme Court of Massachusetts in *Taunton Copper Co.* v. *Merchants' Insurance Co.* (2) is not perhaps consistent with the judgment in *Harris* v. *Moody*. (1) But it proceeded upon different considerations, and is not approved by Phillips (cf. Insurance, vol. i. s. 460). The true view of the matter appears to me to be that the rule against carrying goods on deck is really involved in and depends on a larger and wider rule, which is that goods carried on a vessel should not be stowed so as to be exposed to unnecessary and extraordinary peril during transit. Every one admits that on an ordinary voyage by sea deck cargo is exposed to peculiar and extraordinary danger, and it follows that cargo should not upon such a voyage be stowed upon deck. Where, however, the voyage is not by sea, but is a voyage of a very different kind, other considerations may apply.

In order to apply the principles to be gathered from the authorities to the present case I must add something as to the evidence and facts. On the part of the plaintiffs evidence was called to shew that it is the usage and practice to carry deck cargo on the Rhine steamers. As against this a Dutch lawyer, who practises also as an average adjuster, was called, who referred to certain articles of the Dutch Code, by which the owner of a vessel is liable to the shipper for all damage

(1) (1864) 30 N. Y. 266. (2) (1839) 39 Mass. 108.

to goods carried on deck without the written consent of the shipper. He said that these articles applied to a steamer such as the *Amsterdam III.*, carrying goods by canal and river. I assume that this is a correct account of the Dutch law. The Dutch Code has a hard and fast rule which, though intended primarily, as I am satisfied, to apply to sea-going vessels, is wide enough to include river steamers. The effect of this is to impose a certain liability on the shipowner. But the same gentleman who proved the Dutch law also proved that deck cargoes are very commonly carried on the Rhine steamers, and I understood from his evidence that the usual form of bill of lading used by the Rhine steamers gives express liberty to stow cargo on deck. The form of bill of lading of the Rhine Steamship Company to which I have referred is an example of this, and the Dutch law explains why such form provides for signature not only by the captain, but also by the shippers. I have come to the conclusion that it is, and has been for many years, the practice and usage to carry deck cargoes on Rhine steamers plying from Amsterdam. This is a fact which is not altered by the Dutch Code. The fact that the shipowners undertake a greater liability for cargo on deck than for cargo carried under deck does not appear to me to affect the question as between the assured and the underwriters. If there is such a liability in the present case the underwriters are entitled to the benefit of it. Mr. Scrutton relied upon certain letters written by the plaintiffs to the Holland Steamship Company, in which they maintained that the goods ought not to have been carried on deck. These letters were written with the knowledge and approval of the underwriters, who quite properly desired to make the shipowners pay for the loss if they were liable for it. I do not think that they ought to affect my decision. I may add that if the goods had been shipped under a bill of lading in the form which was produced, by which liberty was given to stow the goods on deck, the defendants would, in my opinion, have been liable under the clause in the policy, "Including all liberties and exceptions as per bills of lading." It could not have been said that the bill of lading was not in an ordinary form. In that case the

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defendants would have had no right over by subrogation against the shipowners. But there is, as I have said, no evidence that the goods were shipped under any such bill of lading. There is only one other point which ought perhaps to be mentioned. It was said that even on an inland voyage goods on deck were exposed to a greater danger of fire at all events than were goods under deck. I do not think that this is well founded. Goods on deck in case of fire have certain advantages and certain disadvantages as compared with goods under deck. I am not sure on which side the balance of advantage lies. But there is certainly no peril from fire or other causes to goods carried on the deck of a Rhine steamer which is in any way comparable with or similar to the peculiar and extraordinary peril to which deck cargo is exposed at sea. I am by no means satisfied that the rule which exempts underwriters from liability for the loss of deck cargo applies to inland voyages by canal or river. I am satisfied that it does not apply to an inland voyage by canal and river plainly contemplated by the policy, on which voyage it is and has been for many years the practice and usage for steamers and other vessels to carry cargoes on deck.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Hollams & Co.*
Solicitor for defendants: *J. Ballantyne.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A. 1903 Dec. 9.

ATTORNEY-GENERAL *v.* REGENT'S CANAL AND DOCK COMPANY.

Revenue—Stamp Duty—Company—Consolidation of Debenture Stock—Issue of Loan Capital—Finance Act, 1899 (62 & 63 *Vict. c.* 9), *s.* 8.

By the special Act of the defendant company, three different debenture stocks of the company, being respectively 3 per cent., 4 per cent., and 4¼ per cent. stock, and amounting to 411,852*l.*, were extinguished, and in lieu thereof there was created a new 3 per cent. debenture stock. The holders of the original 3 per cent. stock received the same nominal amount of the new stock, and the holders of the 4 per cent. and 4¼ per cent. stocks received new stock to such nominal amount as at the rate of 3 per cent. would yield to the holder the same amount as was payable in respect of the stock previously held. The amount of the new debenture stock requisite to carry out the Act was 529,136*l.*, and stock to this amount was inscribed in the names of the persons entitled thereto, and certificates were issued in exchange for the old certificates:—

Held, that the new debenture stock was loan capital which the company had proposed to issue within the meaning of s. 8 of the Finance Act, 1899; and that they were bound to deliver the statement of the amount proposed to be secured by the issue, and to pay the stamp duty imposed by that section upon such a statement.

Judgment of Ridley J., [1903] 2 K. B. 86, reversed.

APPEAL from the judgment of Ridley J., reported [1903] 2 K. B. 86, upon a special case stated by consent in an action by the Attorney-General, as informant, claiming duty and penalties under s. 8 of the Finance Act, 1899.

The defendants were a company incorporated by the Regent's Canal City and Docks Railway Act, 1882, under a name subsequently changed to that of the Regent's Canal and Dock Company.

The defendants from time to time, under their Act of 1882 and other Acts in that behalf empowering them, issued, and there was existing at the date of the passing of the Regent's Canal and Dock Act, 1900, debenture stock to the amount and at the rates of interest following: 110,000*l.* at 3 per cent., 101,852*l.* at 4 per cent., and 200,000*l.* at 4¼ per cent., making

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in all 411,852*l*. The whole of the debenture stock was perpetual.

By the Regent's Canal and Dock Act, 1900, after reciting that it was expedient that the debenture stock issued by the company should be consolidated into a single debenture stock bearing a uniform rate of dividend of 3 per cent., it was provided (inter alia) as follows:—

Sect. 2: "Part 3 (relating to debenture stock) and part 4 (relating to change of name) of the Companies Clauses Act, 1863, are, except where expressly varied by this Act, incorporated with and form part of this Act.

"The new debenture stock by this Act created shall be deemed to be debenture stock created by the company within the meaning of and in accordance with the provisions of part 3 of the Companies Clauses Act, 1863."

Sect. 3: "(1.) On the thirty-first day of December, one thousand nine hundred, the following stocks of the company shall be by this Act cancelled and extinguished (that is to say):

"The three per centum debenture stock, the four per centum debenture stock, the four and a quarter per centum debenture stock.

"(2.) On the thirty-first day of December, one thousand nine hundred, there shall be by virtue of this Act without further or other authority created in lieu of the stocks extinguished by this Act debenture stock of the company (hereinafter referred to as new debenture stock) of such nominal amount as may be necessary for giving effect to the provisions of this section.

"(3.) Every holder of any of the stocks by this Act extinguished shall be entitled to and shall receive in substitution for every one hundred pounds of such stock held by him and so in proportion for every fraction of one hundred pounds new debenture stock as follows (that is to say):

"In the case of holders of existing three per centum debenture stock the same nominal amount of new debenture stock. In the case of holders of existing four per centum debenture stock and of four and a quarter per centum debenture stock respectively, new debenture stock to such nominal amount as at the rate of three per centum will yield to the

holder in cash the same amount as the amount of the interest now payable in respect of the existing debenture stock held by him.

"(4.) The new debenture stock shall bear the dividend of three per centum per annum."

Sect. 4 gave to the company an option to pay cash for fractions of stock less than one pound, and provided for the extinguishing of an equivalent portion of stock.

Sect. 5: "The stock by this Act substituted for any existing stock shall be held in the same rights, on the same trusts, and subject to the same powers, provisions, charges, and liabilities as those on or to which such existing stock was held immediately before the substitution."

The defendants exercised the option reserved to them by s. 4 of the Act to pay the market price in lieu of fractions of stock, but the total amount paid by them in this respect was under 20*s*.

The amount of new debenture stock which was required to carry out the provisions of the Act was 529,136*l*., and debenture stock to this amount was inscribed in the names of the persons entitled thereto under the Act on or soon after January 1, 1901, and certificates in respect of the same were from time to time given in exchange for the old certificates as and when applied for after January 1, 1901.

The questions for the opinion of the Court were:—

1. Whether the defendants had proposed to issue, or issued, any loan capital, and, if so, to what amount?

2. Whether a statement of the whole or any part of the new debenture stock was deliverable by the defendants to the Commissioners of Inland Revenue under s. 8, sub-s. 1, of the Finance Act, 1899 (1), and, if so, of what amount?

(1) Finance Act, 1899 (62 & 63 Vict. c. 9), s. 8: "(1.) Where any local authority, corporation, company, or body of persons formed or established in the United Kingdom propose to issue any loan capital, they shall, before the issue thereof, deliver to the Commissioners a statement of the amount proposed to be secured by the issue.

"(2.) Subject to the provisions of this section, every such statement shall be charged with an ad valorem stamp duty of two shillings and sixpence for every hundred pounds and any fraction of a hundred pounds over any multiple of a hundred pounds of the amount proposed to be secured by the issue, and the amount of the duty shall be a debt due to Her Majesty."

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3. Whether the defendants were liable to pay the sum claimed, or any and what part thereof?

The learned judge gave judgment for the defendants. (1)

The Attorney-General appealed.

Sir R. B. Finlay, A.-G., and *Sir E. H. Carson, S.-G.* (with them *S. A. T. Rowlatt*), in support of the appeal. By s. 8, sub-s. 5, of the Finance Act, 1899, the expression "loan capital" includes debenture stock. The former debenture stock of the company was extinguished by s. 3, sub-s. 1, of their Act of 1900, and by sub-s. 2 a new debenture stock was created in lieu of the old. The amount payable to the holders of the new stock is the same as before, but the indebtedness of the company on capital account has been increased, and their indebtedness to two classes of holders of the original stock has also been increased. Part 3 of the Companies Clauses Act, 1863, deals with the creation and issue of debenture stock. Sect. 28 provides for registration, and s. 29 for the issue of certificates to the holders. The provisions of part 3 of that Act are incorporated in the defendants' Act, and have been carried out in respect of the new debenture stock. The only way in which that stock can have come into the possession of the holders is by its having been issued to them, and it follows that the company must have proposed to do that which they actually did, and that a statement of the amount proposed to be secured by the issue should have been delivered to the Commissioners, and the ad valorem duty should have been paid.

[They referred to *Midland Ry. Co.* v. *Attorney-General.* (2)]

Danckwerts, K.C., and *A. M. Talbot*, for the defendants. The notification required by s. 8 of the Finance Act, 1899, is not in respect of the issue of loan capital, but of the proposal to issue. In this case the company's loan capital had been issued several years before they got their Act of 1900, and what they proposed to do by that Act was to vary it. The holders received precisely the same amount per annum, and no capital was raised either from them or the general public.

(1) [1903] 2 K. B. 86. (2) [1902] A. C. 171.

The rights of holders of debenture stock are to receive a perpetual annuity at a certain rate per annum in proportion to their holdings: *Attree* v. *Hawe* (1); and they would in the case of the winding-up of the company be entitled to a portion of its assets. In an ordinary way the stock could only have been created by a resolution of the company, but in this case it is created without further authority by s. 3, sub-s. 2, of their Act, and the proposal to issue on which the right to claim duty would take effect never came into existence. The actual issue was the acceptance by the holders, and to indicate acceptance no document was necessary.

[They referred to *Blyth's Case*, *In re Heaton's Steel and Iron Co.* (2)]

Sir R. B. Finlay, *A.-G.*, in reply.

COLLINS M.R. This is an appeal from the judgment of my brother Ridley upon a special case. The point to be determined arises on an Act obtained by the defendants in 1900. That Act recited that it was desirable to consolidate the debenture stock previously issued by the company at different rates into a single debenture stock bearing a uniform rate. By s. 2 the Companies Clauses Act, 1863, part 3 was incorporated and the new debenture stock created by the company's Act was to be deemed to be debenture stock created by the company in accordance with the provisions of the Companies Clauses Act. Then follow other provisions to which I will presently refer. The company proceeded under the powers of this Act, and it is said on the part of the Crown that they have brought themselves within s. 8 of the Finance Act, 1899, as being a company established in the United Kingdom who have proposed to issue loan capital, and who are bound, before the issue thereof, to deliver to the Commissioners of Inland Revenue a statement of the amount proposed to be secured by the issue. Upon such a statement a certain duty is imposed, and the question is whether they are liable to that duty.

The company at the time of the passing of the Act of 1900 had created debenture stock which was held at different rates

(1) (1878) 9 Ch. D. 337. (2) (1876) 4 Ch. D. 140.

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of interest, some at 3 per cent., some at 4 per cent., and some at 4½ per cent. By s. 3, sub-s. 1, of their Act these three classes of debenture stock were cancelled and extinguished, and by the next sub-section and without further authority there was created in lieu of the stocks so extinguished a new debenture stock of such nominal amount as might be necessary for giving effect to the provisions of the section. The Act provided that the holders of the stock extinguished should receive new debenture stock, in the case of holders of existing 3 per cent. stock the same nominal amount of new debenture stock, and in the case of the holders of the other stocks such nominal amount as would yield the amount of interest that they had been receiving. The interest on the new debenture stock was 3 per cent., and the effect of the lowering of the rate of interest in two of the original classes of debenture stock would be that the amount of the company's stock would have to be materially enlarged over the former figure. The company acted on the powers given by the Act, and the result was that, by the operation of the Act, one debenture stock was substituted for three classes of debenture stock, one uniform rate of interest was substituted for three different rates of interest, and a larger amount of indebtedness was substituted for the former indebtedness. By the terms of the Act the debenture-holders no longer hold the stock that they previously held which has been extinguished, but they hold that which in the Act itself is designated as new debenture stock. It is contended that the company in contemplating carrying out the provisions of the Act cannot be said to have proposed to issue loan capital. The new debenture stock is undoubtedly loan capital, there has been an increase in the amount, and there has been created and come into the possession of the persons who held the extinguished stock a new stock in amounts in some cases different from those which they held before. I cannot see how it is possible to put into the hands of a certain given number of persons a stock which up to that time had no existence without issuing it to them. It seems to me that all the conditions necessary to constitute an issue of stock were fulfilled; and if what has happened in this case does not constitute an issue of loan

capital, I have very great difficulty in seeing what does. In substance the case seems to be very similar to that of *Midland Ry. Co.* v. *Attorney-General.* (1) No doubt there are technical differences between the two cases due to the different wording of the Stamp Act, 1891, and the Finance Act, 1899; but what was done in the case to which I have referred was to increase the amount of the nominal share capital of the railway company by the cancellation of the existing preference stock, and the creation of a new preference stock to a larger amount, but bearing a smaller dividend, leaving the obligations on the company to the holders exactly where they were before. The same argument was brought forward in each case—that the operation involved no fresh loan—that is to say, no further capital was received from the public; but this Court, and the House of Lords, decided that the company had come under an obligation to pay stamp duty on an increase of the amount of the nominal share capital within the meaning of s. 113 of the Stamp Act, 1891. In this case, though no money has been drawn from the public, the effect of the Act is to create a new stock in the hands of persons who did not hold it before, and, within the meaning of s. 8 of the Finance Act, 1899, the company did issue, and therefore must have proposed to issue, loan capital, and they thereby brought themselves within the obligation imposed by the section to pay the duty claimed.

I cannot agree with the conclusion arrived at by the learned judge, and the appeal must be allowed.

MATHEW L.J. I am of the same opinion. It seems to me to be plain that the defendant company have issued loan capital. Debenture stock such as they have issued is declared by s. 8, sub-s. 5, of the Finance Act, 1899, to be loan capital within the meaning of that section. The special Act provides for the placing of the debenture stock of the company on one footing, and in order to do this there is a provision for the cancellation of the three original classes of stock. In substitution there is to be created a new debenture stock. The operations indicated by the Act have been carried out, and it seems to me that the position is the same as it would have

(1) [1902] A. C. 171.

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been had the original debentures been paid off and the amount required borrowed again on the terms specified in the Act. That being so, the case, in my opinion, comes within the language of s. 8 of the Finance Act, 1899, and must be treated accordingly. I agree that the judgment must be reversed.

COZENS-HARDY L.J. I agree. Stated shortly, the effect of the operation of the Act is that the old charge on the company in respect of the three classes of debenture stock is extinguished and cancelled and has gone altogether, and that a new charge for a larger amount represented by a different stock has been created. It is said that there has been no issue, and therefore no proposal to issue. When we look at s. 3, sub-s. 3, we find that every holder of extinguished stocks is to receive a certain proportion of new stock in substitution for the old stock. From whom is he to receive this? Clearly from the company, who, by giving to the stockholder that which he is entitled to receive, must be taken to have issued it. It is true that in certain cases no certificate by the company is necessary to constitute an issue, and *Heaton's Steel and Iron Co.* (1) was cited, but in that very case it was held that there was an issue of shares when the company had inserted the name of the shareholder on the register. When, under the combined operation of the company's special Act and s. 28 of the Companies Clauses Act, 1863, we find that the company is under a parliamentary obligation to keep a register, and to insert therein the names of the new stockholders, it seems to me that nothing more is required to satisfy the words "issue of loan capital." That being so, the case falls within the provisions of the Finance Act, 1899, and the appeal must be allowed.

Sir R. B. Finlay, A.-G. The Crown does not ask for the penalties, and the judgment will be for the duty with interest.

Appeal allowed.

Solicitor for informant: *Solicitor of Inland Revenue.*

Solicitors for defendants: *Hollams, Sons, Coward, & Hawksley.*

(1) 4 Ch. D. 140.

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1903
Dec. 11.

BLOVELT *v.* SAWYER.

Employer and Workman—Workmen's Compensation—Break in Employment —Accident during Dinner Hour—Workmen permitted to remain on Premises—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1.

A workman was paid by the hour for the number of hours per week that he was actually engaged on his work, not including the mid-day dinner hour. During that hour he was at liberty to stay and take his meal on the premises, or to go elsewhere. He stayed on the premises, and sat down to eat his dinner, and while so doing a wall fell upon him, and he was injured. On appeal from the refusal of an application for an award of compensation under the Workmen's Compensation Act, 1897 :—

Held, that during the dinner hour there had been no break in the employment of the workman, and that he was entitled to claim compensation.

Appeal from the refusal of the judge of the North Shields County Court to award compensation, under the Workmen's Compensation Act, 1897, to the applicant in respect of injuries caused to him by an accident.

The applicant was a bricklayer in the employment of the respondent, and was engaged in building a house. No question arose as to the height of the building. It appeared from the evidence that there was no mess-cabin in which the workmen could take their dinner, and that they could either leave the premises or remain on them during the dinner hour. The applicant remained on the premises on the day on which the accident occurred, and sat down by the side of a wall that was newly built to eat his dinner. The wall fell upon him and caused the injuries in respect of which he claimed compensation.

The only evidence upon the judge's notes as to the wages of the applicant was that he received about 2*l.* per week; but on the argument of the appeal it was stated that admissions were made at the hearing that he was paid weekly at a fixed rate per hour for the hours that he had worked, and that in

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arriving at the amount to which he was entitled the dinner hour was not included.

The county court judge was of opinion that, as the applicant had sat down for the purpose of eating his dinner when the accident happened, the accident did not arise out of and in the course of his employment, and the application was dismissed.

The applicant appealed.

Ruegg, K.C., and *Chester Jones* (*Harold Morris* with them), in support of the appeal. The accident arose out of the employment of the applicant, for it was one of the risks that he took. It also arose in the course of the employment. He was employed by the week, and though he was paid by the number of hours that he worked, excluding the interval for dinner, there was no break in the employment during the dinner hour. It is not contended that the master would be liable where a workman goes away on his own business and is injured, but the workman may be in the course of his employment in coming to or going from the place where he works, or, as in this case, in an interval allowed for meals or any other necessary purpose, in which he remains on the premises. The continuation of employment, though no work is being done at the time, is illustrated by *Brydon* v. *Stewart* (1), in which men throwing up their work and leaving a mine were held entitled to recover against their employer as if they were actually engaged in his work at the time of the accident; and in *Cowler* v. *Moresby Coal Co.* (2), in which a miner discharged on a Saturday went down on the following Monday into the mine to get his tools.

Meynell, for the employer. The onus is on the applicant to shew that the accident arose out of and in the course of his employment. He failed to shew this because he was not receiving pay for the dinner hour and he stayed on the premises for his own purposes. As he was not actually engaged in any act of service, and was on the premises for his own pleasure, the accident did not arise out of the employ-

(1) (1855) 2 Macq. 30. (2) (1885) 1 Times L. R. 575.

ment: *Smith* v. *Lancashire and Yorkshire Railway*. (1) So in *Smith* v. *South Normanton Colliery Co.* (2) the workman was not entitled to compensation as he was not at the time of the accident engaged on his employment, which had come to an end. [He also cited *Lowe* v. *Pearson*. (3)]

Ruegg, *K.C.*, in reply. The only question in this case is whether the course of the employment had been broken. If the rule had been that the workmen were to remain during the dinner hour, the case would have been clear, and staying, upon an option given to do so or to leave the premises, prevents any break in the employment.

COLLINS M.R. I am of opinion that this appeal should be allowed. The applicant was a bricklayer, paid, as we are informed, by the hour, though that is not to be found in express terms in the judge's note. What happened was that in the dinner hour, in which it was open to him to go away from the premises, he stayed and sat down to have his dinner by a wall which had just been built. It appears from his evidence that there was no rule as to the workmen going or staying during the dinner hour, and that he was at liberty to do either. The learned judge of the county court has given judgment in a few words. He says: "I was of opinion that, as the applicant had sat down for the purpose of eating his dinner when the accident happened, the accident did not arise out of and in the course of his employment, and therefore dismissed the application." On the evidence as it stands on the judge's notes I should have felt no difficulty, because it would appear primâ facie to indicate that the man was in his master's employment during the whole of each day, from the time at which he went to his work to the time when he came away, and equally during the dinner hour, if he stayed, as during any other part of the time. He would be there on the contract with his master during all those hours, either directly in order to do that for which he was employed or for some purpose ancillary thereto. That would embrace all his

(1) [1899] 1 Q. B. 141. (2) [1903] 1 K. B. 204.
(3) [1899] 1 Q. B. 261.

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movements within the ambit of the factory, going or coming, or stopping there for any purpose ancillary to his work. But we are told that there were admissions made between the parties, which do not appear on the judge's note, that men in the position of the applicant were not paid by the day or week, but by the hour, and that the dinner hour was excluded from the computation of his wages, and was not a time during which he was earning pay. That creates a difficulty, or, at all events, requires consideration. It seems to me, however, that if the dinner hour can be brought in as part of the time which is given by the workman for some purpose ancillary to his work, such as feeding himself, which is, of course, essential to enable him to do his work, it would be taking too technical a view to say that the pause in the actual course of his work for the purpose of eating his dinner was a break in his employment from the time that he stopped work to the time at which he began again. It seems to me that, notwithstanding what is alleged as to the payment being for the hours in which the applicant was actually engaged in work and not for the time in which he took his meals, we must take a broader view, and treat him as continuing in the employment of the master by the consent of the master, inasmuch as it is for the master's advantage that the workmen should have an opportunity to feed themselves. A workman would do his work all the better by taking his meal at that time, and if it is part of the contract between him and his master that he may do so upon the works instead of going away, that may be a matter of mutual convenience. A man might, for instance, live at a distance, and it might be desirable, from the master's point of view, that he should not tire himself by going to and fro for his food instead of reserving his strength for his work. It does not seem to me that, as a matter of law, it can be said that, when sitting down to his dinner, the applicant had ceased to be in his master's employment. From the mere facts that he was not paid for this particular time and that he was not engaged in the main purpose of his work it cannot, as a matter of law, be said that he had ceased to be in the employment of his master. The accident to the applicant can, as it seems to

me, be properly said to have arisen out of and in the course of his employment, and, that being so, the appeal must be allowed.

MATHEW L.J. I am of the same opinion. The county court judge seems to have been under the impression that when this man sat down to eat his dinner on the premises he ceased to be in the employment of his master, whatever may have been the arrangement between them. It appears that the arrangement as to wages was that the man should be paid for as many hours as he was actually at work, but not for the dinner hour in the middle of the day. It also appears that he was not obliged to leave the place where he was working and obtain shelter and food elsewhere. That being the case, how can it be said that this accident did not occur in the course of his employment? The learned county court judge seems to have thought that the test whether the employment was continuing at the time when the accident happened was whether wages were paid for that time. It seems to me that under the circumstances of this case the wages paid to the applicant covered this time, although the dinner hour was not taken into account in computing the amount. I do not think it possible to arrive at any other conclusion than that the accident happened in the course of the man's employment. It could not reasonably be held that he had broken his contract of employment when he ceased to work in the dinner hour. I agree that the appeal must be allowed.

COZENS-HARDY L.J. I agree. The learned judge has not found in very clear terms what were the precise conditions of the employment. I gather, however, from the admissions that there was a contract by which the applicant was to be paid at the rate of so much an hour for the time that he was actually at work, and that it was a term of the contract that the dinner hour might be spent either on or off the premises. If it had been part of the contract, as it is in some employments, that the dinner hour should be taken on the premises, there could not have been a doubt that an accident occurring

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during the dinner would have occurred in the course of the employment, because by the contract the workmen would be bound to be on the premises. In my view it can make no difference if the fact is that by the terms of the particular engagement the workman was to have the right, if so minded, to get his dinner on the employer's premises. I think it would be to place a narrow construction on the Act if we held that the accident to the applicant did not occur in the course of his employment. I agree that the appeal succeeds, and the case must go back to the county court.

Appeal allowed.

Solicitors for applicant: *Shaen, Roscoe, Massey & Co.*

Solicitors for respondent: *Busk, Mellor & Norris, for C. J. R. Brown & Holliday, North Shields.*

A. M.

DAWSON *v.* GREAT NORTHERN AND CITY RAILWAY COMPANY.

1903
Oct. 28;
Dec. 8.

Lands Clauses Acts—Injurious Affection—Right to Compensation for—Assignment of—Right of Assignee to sue in own Name—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25.

The defendants constructed under statutory powers a tunnel for the purposes of their railway. The construction of the tunnel caused a subsidence of the soil, whereby certain houses, not taken by the defendants, suffered structural damage; and the owners of the houses thereupon became entitled to compensation for injurious affection under s. 68 of the Lands Clauses Act, 1845. After the damage had occurred the owners of the houses assigned their interests in them, together with their rights to compensation, to the plaintiff. At an inquiry held for the purpose a jury assessed the amount of compensation payable in respect of the damage done to the houses. The action was brought by the plaintiff as assignee in her own name upon the verdict and judgment obtained at the said inquiry:—

Held, that compensation for injurious affection under s. 68 is in the nature of damages for a tort; that a right to sue for damages in tort is not a legal chose in action within the meaning of s. 25 of the Judicature Act, 1873; and that consequently the plaintiff was not entitled to sue as assignee in her own name.

Action tried before Wright J. without a jury.

The defendants constructed, under powers conferred by a special Act passed in 1895 incorporating the Lands Clauses Act, 1845, an underground railway running in two tunnels from the City of London to a junction with the railway of the Great Northern Railway Company at or near Finsbury Park Station on the last-mentioned railway. The said underground railway was carried in the immediate vicinity of certain houses known as Nos. 135, 137, and 139, City Road, and Nos. 15, 17, and 19, East Road. Of these houses Nos. 135 and 137, City Road and the three houses in East Road were held by one Berry as lessee for a term of eighty years from Lady Day, 1879, and No. 139, City Road by one Vickery for a similar term from the same date.

The portion of the defendants' works situate in the immediate vicinity of the said houses was executed between the

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beginning of April, 1901, and the end of October in that year. Some time between the commencement of the works and the end of the year 1901 there occurred as a result of the making of the tunnels a subsidence of the soil causing structural damage to the said houses.

On March 19, 1902, after the damage had been done to the premises, Berry assigned his lease of the five houses held by him to the plaintiff, Mrs. Dawson; and by a deed of even date, reciting that the said premises had been seriously damaged by the works of the defendants, he further assigned to the plaintiff all sums of money which he might be entitled to recover from the defendants by way of compensation for structural damage or otherwise in respect of the said premises and all his rights of every description against the defendants in relation thereto. And on May 6, 1902, Vickery similarly assigned to the plaintiff his lease of the house No. 139, City Road, and all his rights against the defendants in respect of structural or other damage to the said premises. Due notice of the said assignments was given by the plaintiff to the defendants. On June 25, 1902, the plaintiff made a claim in her own name against the defendants under s. 68 of the Lands Clauses Act for compensation for structural damage. An order having been made under s. 41 of the Regulation of Railways Act, 1868, that the question of the amount of compensation payable by the defendants to the plaintiff should be tried before a judge of the High Court and a jury, the trial was had before Ridley J. and a jury, and the amount was duly assessed by the verdict of the jury, and judgment thereon was given on February 6, 1903. Upon that verdict and judgment the plaintiff brought the present action in her own name to recover the compensation so assessed. (1)

(1) The plaintiff's claim and the verdict of the jury further included compensation for structural damage to certain other houses in the City Road and East Road respectively, beneath which the defendants' tunnels were carried, and of which houses the plaintiff at the date of the claim made by her was the freeholder. The defendants had in March, 1899, given to a Mr. Blake, the then freeholder of these houses, a notice to treat for the purchase by the defendants of an easement or right of using the subsoil thereunder for the purposes of their tunnels. On February 6, 1900, by an agreement which related to these houses amongst others, Mr. Blake sold

McCall, K.C., *G. Cave*, and *C. C. Hutchinson*, for the defendants. The plaintiff claims as assignee of Berry's and Vickery's rights to compensation for damage that had already accrued. That is not a right which is assignable so as to entitle the assignee to sue in her own name under s. 25 of the Judicature Act. A right of action to recover unliquidated damages even for a breach of contract is not a "legal chose in action" within the meaning of that section: *May* v. *Lane*. (1) Still less is a right to recover unliquidated damages in tort. The expression "legal chose in action" does not include such a right of action, for if it did "this sub-section of the Judicature Act would materially affect the law of champerty and maintenance"—per Rigby L.J. in *May* v. *Lane* (2)—a result which was never intended.

Sir E. Clarke, K.C., and *H. Dobb*, for the plaintiff. The plaintiff is entitled to sue in her own name. In *King* v. *Victoria Insurance Co.* (3) the Privy Council held that a right to recover damages for a negligent collision was assignable under the corresponding section of the Queensland Judicature Act. And in *In re Park Gate Waggon Works Co.* (4) it was held that claims of a company against its directors for misfeasance were "things in action" of the company within s. 95, sub-s. 3, of the Companies Act, 1862, and could be assigned by the official liquidator.

Cur. adv. vult.

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to the defendants the easement mentioned in the notice to treat for a sum which was to include satisfaction for all damage except structural damage through drainage or subsidence caused by the works of the company. In March, 1901, Mr. Blake sold the freehold of these houses to the plaintiff. Subsequently to the date of this sale there occurred, as the result of subsidence caused by the tunnels, the structural damage which formed the subject of this part of the plaintiff's claim. Wright J. held that, the claim being in respect of damage to an interest created after the date of notice to treat, the case fell exactly within the decision of the Court of Appeal in *Mercer* v. *Liverpool, &c., Ry. Co.*, [1903] 1 K. B. 652, and that the plaintiff was not entitled to compensation. Under these circumstances it has been thought advisable to omit from the report this branch of the case and the portion of Wright J.'s judgment relating to it.

(1) (1894) 64 L. J. (Q.B.) 236.
(2) 64 L. J. (Q.B) at p. 238.
(3) [1896] A. C. 250.
(4) (1881) 17 Ch. D. 234.

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Dec. 8. WRIGHT J. This action is brought upon a verdict and judgment obtained by the plaintiff at an inquiry held before a judge and jury, in lieu of a sheriff and jury, under the provisions of the Regulation of Railways Act, 1868, s. 41, for the purpose of assessing the compensation to be paid by the defendants to the plaintiff for damage caused to her premises, stock, and trade as a result of subsidence consequent on the construction by the defendants of tunnels for an underground railway. The plaintiff's premises which were so injured included certain leasehold houses, Nos. 135, 137, and 139, City Road, and Nos. 15, 17, and 19, East Road. The defendants' works were executed between the beginning of April, 1901, and the end of October, 1901. The structural damage, which is now admitted to have been the result of those works, occurred between the beginning of April, 1901, and December 31, 1901. In addition to the cost of making good this structural damage, the plaintiff's stocks were damaged and her trade injuriously affected during repairs which were executed during 1902. The leasehold houses in question were acquired by the plaintiff by assignments for long terms from Berry and Vickery in March and May, 1902, after the structural damage had occurred, the assignments of the leases being accompanied by assignments from Berry and Vickery of their respective rights to compensation. Notice of these last-mentioned assignments were given to the defendants in supposed accordance with s. 25 of the Judicature Act. No notices to treat had ever been given by the defendants to any one in relation to the premises comprised in these leases, and the plaintiff's claim was founded on the assignments to the plaintiff by Berry and Vickery of their rights to compensation. The assignment by Berry recites that the premises have, before the date thereof, become damaged, and the assignment by Vickery is expressly limited to things done or omitted before its date.

The question which arises upon the assignments is not whether the plaintiff is entitled to the benefit of them, nor whether she might not have proceeded in the names of the assignors to obtain an assessment of the compensation to which they were entitled, and which she might have claimed from

them after assessment. The question is whether she could in her own name proceed for the assessment, and in her own name enforce payment of it as against these defendants.

In considering this question it is important to observe that the claims which Berry and Vickery purported to assign were founded on s. 68 of the Lands Clauses Act, and not on any notice to treat. If the assigned claims had been claims arising upon a notice to treat, they might have been regarded as claims arising upon a contract, or as claims to something which might be considered as the price payable by the defendants for the right to exercise their powers in the assignor's lands, and therefore as property, and, in either view, as legal choses in action. But, in the absence of any notice to treat, the element of contract or quasi-contract or of proprietary right seems to be wanting, and the claim seems to be in the nature of a claim for damages for a wrong—a wrong indeed which cannot be stopped by injunction or otherwise remedied in an action, but which gives rise to a right to assessment of damages; and in the apparent absence of authority I think that such a claim is not a legal chose in action within the meaning of the Judicature Act, 1873, s. 25: see *May* v. *Lane* (1) in the Court of Appeal. There are no doubt some expressions in the judgments of the Lords Justices in the case of the *Colonial Bank* v. *Whinney* (2) which seem to approve a statement in Williams on Personal Property, to the effect that a right to damages for a tort may be a legal chose in action; but the decision of the Court of Appeal in that case was reversed in the House of Lords (3), and it is difficult to suppose that it was intended by s. 25 of the Judicature Act to make all rights as to damages—for example, for libel or assault—assignable under that section. But, however this may be, there are other difficulties in the plaintiff's way. The assignments by Berry and Vickery of their claims could of course operate only as assignments of what they were entitled to. But the jury seem to have given compensation, not for the damage sustained by Berry or Vickery, but for the damage sustained by the plaintiff.

(1) 64 L. J. (Q.B.) 236. (2) (1885) 30 Ch. D. 261.
(3) (1886) 11 App. Cas. 426.

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Wright J.

This is clearly so as to the damage to trade and stock. The learned judge at the hearing directed the minds of the jury to nothing but the injury to the plaintiff's own trade and stock. Berry and Vickery were not shewn to have suffered any damage to their trade or their stock, and, as regards the structural damage also, the jury seem to have been allowed to assess the compensation on the footing of what the damage was to the plaintiff, and the measure of that is not necessarily the same as the measure of what the damage would have been to premises as used for different trades and purposes which might require different degrees of repair. Without the aid of the Judicature Act, it seems to me clear that the plaintiff could not take proceedings in her own name. All the damage was done before the assignments of the leases, and was damage done, not to her interest, but to the interests of Berry and Vickery, and could not be claimed by her in her own name. So far as I know, there is no principle of law which enables a purchaser of an estate or interest in land to maintain an action for a wrong done in relation to the land during the time when it belonged to his vendor, except where the wrong is a continuing one, as in the case of a permanent nuisance: see *Penruddock's Case* (1), and per Parke B. in *Thompson* v. *Gibson* (2); and I think that the law must be the same in relation to claims under s. 68 of the Lands Clauses Acts.

Judgment for defendants.

Solicitors for plaintiff: *Julius A. White.*
Solicitors for defendants: *Le Brasseur & Oakley.*

(1) (1598) 5 Rep. 100 b.
(2) (1841) 7 M. & W. 456, at p. 461; 56 R. R. 762, 766.

J. F. C.

ELLIS *v.* LONDON COUNTY COUNCIL.

1903
Dec. 14, 15.

Metropolis—Building—Drainage of Houses on low-lying Land—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 122.

Land is "so situate as . . . . to admit of being drained by gravitation into an existing sewer" within the meaning of s. 122 of the London Building Act, 1894, if it is situate at such a level that the drainage from it will find its way by gravitation into the sewer under the ordinary conditions of the sewer, although during a substantial number of days in the year that drainage is in fact prevented from passing into the sewer by reason of the sewer becoming surcharged with rain-water and of the pressure of that water inside the sewer closing a flap or valve at the inlet of the sewer.

CASE stated by a metropolitan police magistrate.

On January 28, 1903, ten informations were laid on behalf of the respondents, charging that the appellants in each of the ten cases did, without the permission of the county council, unlawfully erect a building to be used wholly or in part as a dwelling-house upon land of which the surface was below the level of Trinity high-water mark, and which was so situate as not to admit of being drained by gravitation into an existing sewer of the council, contrary to the provisions of s. 122 of the London Building Act, 1894. (1)

Upon the hearing the following facts were proved or admitted:—

The appellant was the owner of, and the person who erected, the said dwelling-houses on a piece of land at Charlton in the borough of Greenwich. No permission for their erection was obtained by him from the respondents.

The level of the lowest floor of the ten houses is 7 ft. above ordnance datum, and the land on which they were built is about 1 ft. 6 in. or 2 ft. below the lowest floor, i.e., about 5 ft.

(1) By s. 122 of the London Building Act, 1894, "It shall not be lawful for any person upon land of which the surface is below the level of Trinity high-water mark, and which is so situate as not to admit of being drained by gravitation into an existing sewer of the council, to erect any building to be used wholly or in part as a dwelling-house . . . . except with the permission of the council."

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or 5 ft. 6 in. above ordnance datum. Trinity high-water mark is 12 ft. 6 in. above ordnance datum, so that the land in question is about 7 ft. or 7 ft. 6 in. below Trinity high-water mark.

Provision was made by the appellant for draining the houses into a sewer belonging to the borough of Greenwich, known as the Ransom Road sewer, having a diameter of 15 in. and falling towards and opening into the respondents' Southern Main Outfall Sewer. This outfall sewer is of circular section, having an internal diameter of 11 ft. 6 in., and the inner or lower side of its arch is 5 ft. 6 in. above ordnance datum, so that the appellant's land on which the houses were built is as nearly as may be on the same level as the inner side of the arch of the outfall sewer. The Ransom Road sewer is connected with it at a point about half-way up its side, and the opening or junction is protected by a hinged flap which, when the outfall sewer becomes flooded, closes automatically, and so prevents the metropolitan sewage flowing along the outfall sewer from passing up into the Ransom Road sewer. At the point of inlet into the Ransom Road sewer of the drain provided by the appellant is a manhole which is 250 ft. from the farthest of the ten houses, and the length of the Ransom Road sewer from the manhole to its inlet into the outfall sewer is 350 ft. The total fall of the drain from the farthest off of the appellant's houses to the manhole is 5 ft. 6 in., and that of the Ransom Road sewer from the manhole to the outfall sewer is 2 ft. 7 in.

The Ransom Road sewer was constructed and connected with the outfall sewer in 1894 by the permission and sanction of, and in accordance with the requirements of, the respondents pursuant to the Metropolis Local Management Acts. The outfall sewer is discharged and emptied by means of a pumping station at Crossness on the south side of the river Thames erected for that purpose and under the control and management of the respondents.

The outfall sewer necessarily receives much of the flood-water of the metropolis, so that in times of flood and even after moderate rainfall it becomes full and surcharged. The effect

of this condition of the outfall sewer upon the Ransom Road sewer is that at times of flood and moderate rainfall no sewage or drainage can pass from the latter sewer at all, and it necessarily becomes more or less full.

It was not suggested that the appellant's land could be drained into any existing sewer of the respondents other than the said outfall sewer.

The magistrate found that during the greater part of the year the houses admitted of being and were drained by gravitation into the Ransom Road sewer, and through that into the Southern Outfall Sewer; but that for a substantial number of days in the year the drainage of the land upon which the houses were erected could not pass into the outfall sewer; that the Ransom Road sewer, being a sewer of the Greenwich Borough Council, is not, but that the Southern Outfall Sewer is, an existing sewer of the respondents within the meaning of s. 122 of the London Building Act, 1894. He held that it was immaterial whether the impossibility of draining the land into the outfall sewer at certain periods as above mentioned was or was not due to insufficient pumping arrangements provided at Crossness by the respondents, or whether it was or was not due to the inefficiency or incapacity of the sewer, and that for the purposes of the section the sewer and the appliances connected therewith must be taken as they existed at the time the buildings were erected; and that as the land was not, and did not admit of being, constantly and effectually drained into the outfall sewer, it did not admit of being drained by gravitation into an existing sewer of the respondents within the meaning of s. 122. He accordingly convicted the appellant subject to a case for the opinion of the Court.

The Appellant in person. The land upon which the houses stand admits of being drained by gravitation into the outfall sewer. It is in fact so drained during the greater part of the year, and a periodical interruption of the passage of the drainage cannot affect the question. All that the section means is that the houses must be at such a level above the sewer that the drainage from them would flow down into

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it if the sewer were empty, or at all events if it were in its ordinary condition. Further, as the respondents sanctioned the connection of the Ransom Road sewer with the outfall sewer, it does not lie in their mouth to say that the drainage which finds its way into the former is incapable of being drained into the outfall sewer.

Avory, K.C., for the respondents. The "sewer," into which s. 122 requires dwelling-houses on low-lying land to be capable of being drained, means an effective sewer—that is to say, one which is capable at all times of the year of receiving the sewage. A sewer, the inlet to which is periodically stopped up, is, during the period of the stoppage, and quoad the land intended to be served through the inlet, not a sewer at all. The case finds that the stoppage occurred on a substantial number of days in the year, and no distinction in principle can be drawn between a stoppage during a substantial part of the year and a stoppage for the whole year.

LORD ALVERSTONE C.J. I am of opinion that the magistrate was wrong in holding that the appellant's houses did not admit of being drained by gravitation into the Southern Outfall within the meaning of s. 122 of the London Building Act, 1894. That section provides that, "It shall not be lawful for any person upon land of which the surface is below the level of Trinity high-water mark, and which is so situate as not to admit of being drained by gravitation into an existing sewer of the council, to erect any building to be used wholly or in part as a dwelling-house." Now, the houses in question were erected by the appellant on land below the level of Trinity high-water mark, and were intended to be used as dwelling-houses. But the houses stand at such a level as admits of their being drained by gravitation into the Southern Outfall Sewer under the ordinary conditions of that sewer. It is not disputed that if the outfall sewer did not receive the drainage of any other sewers, the Ransom Road sewer through which the drainage of these houses passes could at all times discharge into the outfall sewer. The magistrate has found that during the greater part of the year it can and does so discharge, but

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Lord Alverstone C.J.

that for a substantial number of days in the year it fails to do so, owing to the fact that the outfall sewer, having to receive much of the flood-water of the metropolis, becomes so heavily charged with water even in times of moderate rainfall that the flaps which are made to shut with the pressure of the flood-water close the mouth of the Ransom Road sewer. The magistrate was of opinion that the reason why the drainage would not pass at these times from the Ransom Road sewer into the outfall sewer was immaterial, and that the mere fact that it would not pass was sufficient to prevent the appellant's houses from admitting of being drained by gravitation into the outfall sewer. It is in that respect that I think the magistrate was wrong. In my opinion, the houses do not the less admit of being drained by gravitation into the outfall sewer because on certain days that sewer is so used by the council that the drainage will not pass into it. It is to be observed that the question of the level at which the houses stand has little to do with the case. For suppose that the surface of the land on which they are built was ten feet higher so as to be above the level of Trinity high-water mark, and consequently to be outside the operation of the section altogether, the same difficulty of getting the drainage to pass into the outfall sewer at times when owing to the pressure of the water the flaps were shut might equally exist. I think the appeal ought to be allowed.

LAWRANCE AND KENNEDY JJ. concurred.

Appeal allowed.

Solicitor for respondents: *Blaxland.*

J. F. C.

[1948] 1 All E.R. 796. [1948] 1 Ch. 298

1903
Dec. 15.

HORAN *v.* HAYHOE.

Revenue — Assessed Taxes — Stable-boy — Apprentice — "Male Servant" — Revenue Act, 1869 (32 & 33 *Vict. c.* 14), *s.* 19, *sub-s.* 3.

The employer of an apprentice under a bonâ fide contract of apprenticeship is not required to take out a licence for the apprentice as a male servant under s. 18 of the Revenue Act, 1869, even though the apprentice is employed in one of the capacities specified in the definition of "male servant" in s. 19, sub-s. 3, of that Act.

CASE stated by justices of Newmarket.

On February 27, 1903, an information was preferred by the appellant, an officer of inland revenue, against the respondent, a trainer of race-horses, under 32 & 33 Vict. c. 14, charging that the respondent employed eight male servants, for the employing of each of whom a licence was required by the statute, and being a greater number of servants than he was authorized to employ by any licences granted under the said statute. At the hearing no witnesses were called on behalf of either party, but the case was argued upon the following admissions:—

(1.) That the eight persons described as male servants in the information were Thomas Baldwin and seven other specified persons.

(2.) That the seven persons last mentioned were employed as stablemen, and that a male servant's licence was required in respect of each of them.

(3.) That licences for seven male servants had during the current year and previously to the date of the information been obtained by the defendant and were applicable to those seven servants.

(4.) That Thomas Baldwin was bound to the respondent for a period of seven years under a contract dated May 25, 1897, of which a copy was annexed to the admissions.

(5.) That Thomas Baldwin was employed for the greater portion of each day in the performance of duties which would, if he were engaged otherwise than under the said contract, render a licence necessary for him as a male servant.

(6.) That the terms and covenants of the said contract had since May 25, 1897, been faithfully and honestly carried out and fulfilled by the parties thereto respectively.

(7.) That the respondent was the employer of all the persons above mentioned.

The contract above mentioned, dated May 25, 1897, was a deed of apprenticeship in the ordinary form made between Thomas Baldwin the younger (the apprentice) of the first part, Thomas Baldwin the elder (his father) of the second part, and the respondent Alfred Hayhoe, of Palace House, Newmarket, trainer of horses, of the third part, and witnessed that the apprentice bound himself to serve the respondent for the term of seven years from May 25, 1897, the respondent covenanting during the said term to teach and instruct the apprentice in the arts of a training groom and of riding as connected therewith, to provide him with food and lodging, and to provide him also during the first two years with clothing in lieu of wages, and during the remaining five years to pay him annual wages, rising by yearly increments of 2*l.*, from 8*l.* to 14*l.*, and further to pay him one-half the fees earned by him in riding races.

The justices found as a fact that the contract was one of apprenticeship, and that the said Thomas Baldwin the younger was not a servant within the meaning of the statute, but an apprentice, and they accordingly dismissed the information subject to a case for the opinion of the Court.

Sir E. Carson, S.-G., and *Rowlatt*, for the appellant. Under the present taxing Act, the Revenue Act, 1869, any person who is employed in any of the capacities mentioned in s. 19, sub-s. 3, is a "male servant" for the purposes of the Act, none the less because he is employed under a contract of apprenticeship. The Act only speaks of servants; it is silent as to apprentices. But an apprentice is a kind of servant: he contracts to serve his employer and obey his lawful commands; and he is not the less a servant because his master is bound to teach him his trade. The earlier Revenue Acts made special provision with respect to apprentices. Thus

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the 17 Geo. 3, c. 39, having enacted in s. 1 that a duty should be paid "for every male servant" employed in certain specified capacities, provided in s. 4 that nothing in the Act should extend to exempt any person from payment of the duty imposed by the Act in respect of any servant employed in any of the capacities aforesaid "on account or under pretence that such servant is or shall be bound as an apprentice to such person," except such apprentices, not exceeding two in number, as shall be imposed upon any master or mistress under the powers given to magistrates or parish officers. A similar provision as to apprentices is contained in 25 Geo. 3, c. 43, s. 8, and 43 Geo. 3, c. 161, Sched. C, 4. This reference to apprentices is omitted for the first time in 16 & 17 Vict. c. 90. But the effect of the omission is not to restrict the meaning of the word "servant."

Scott Fox, K.C., and *T. F. Hobson*, for the respondent. The main object of apprenticeship is, not to serve the employer, but to learn the employer's business. The fact that in the earlier Acts it was thought necessary to specially mention apprentices suggests that primâ facie they do not come within the term servant. Wherever the meaning of a taxing Act is not quite clear, the Court in construing it will lean in favour of the taxpayer.

LORD ALVERSTONE C.J. The facts of this case are, I think, not sufficient to bring this particular employee within the provisions of the Revenue Act, 1869. It is a wholesome principle which has often been recognised, that taxing Acts must be reasonably clear and precise as to the subjects which are intended to be taxed. In the earlier taxing Acts to which we have been referred, in which the enumeration of the various kinds of employees coming within the category of servants is practically the same as that in the Act before us, it seems to have been thought necessary to insert special provisions to bring apprentices within that category. But that fact does not, I think, assist us much in arriving at the interpretation which ought to be put upon the Act of 1869. That Act imposes a tax upon "servants," and it must

have been intended thereby that the person to be taxed should under ordinary circumstances stand to his employer in the relation of servant to master. Did the employee in this case stand in that relation? That depends upon the terms of the contract under which he was employed. That contract was one which was not necessary for the mere hiring of a groom. I think the justices were quite right in regarding this as a bonâ fide contract of apprenticeship, meaning that the real object of the contract was that he should be taught to be a riding groom, and not merely that he should be employed as a stable-boy for a term of seven years. It is not, in my opinion, enough to bring him within the Act that he should, in the ordinary course of his training and for the purpose of learning his business, perform the duties of a stable-boy during a considerable part of each day.

LAWRANCE J. I agree.

KENNEDY J. I am of the same opinion. The person who is aimed at by the Act is a male who is doing certain classes of work, and who is doing that work as a servant for a master. It may be that an apprentice does to some extent do the class of work which would be done by a servant, but he does not do it as a servant. His relation to his employer is one of apprenticeship and not of service, and carries with it certain special incidents, and in particular that of being entitled to instruction as well as to the food or wages to which a servant would be entitled. In the absence of a clear indication in the Act that it includes, not merely a male person who is employed as a servant in one of the capacities enumerated, but also a person who is employed as an apprentice as distinguished from a servant, I think it does not cover the present case.

Appeal dismissed.

Solicitor for appellant: *Solicitor of Inland Revenue.*

Solicitors for respondent: *Ruston, Clark & Ruston, for A. H. & A. Ruston, Newmarket.*

J. F. C.

C. A.
1904
Jan. 25.

[IN THE COURT OF APPEAL.]

BEAUMONT *v.* KAYE AND WIFE.

Practice—Husband and Wife—Wife's Tort—Action against Husband and Wife jointly—Libel—Pleading—Payment into Court—Denial of Liability—Order XXII., r. 1.

In a statement of defence in a common law action of tort against a husband and his wife jointly for a libel published by the wife, the husband pleaded payment of money into court in satisfaction of the claim, and the wife pleaded in denial of liability:—

Held, that such a mode of pleading was inadmissible.

APPEAL from an order of Bucknill J. at chambers striking out certain paragraphs of a statement of defence.

The action was against a husband and his wife jointly for a libel published by the wife during coverture.

The statement of claim merely alleged the publication of a libel concerning the plaintiff by the wife, and claimed damages.

In the defence the husband, so far as he was liable as husband of the other defendant, pleaded payment of a sum of money into court in satisfaction of the claim; and the wife pleaded certain paragraphs denying publication of the libel by her, and stating other matters in denial of liability.

The plaintiff applied to a district registrar for an order to strike out these paragraphs of the defence on the ground that they were pleaded in contravention of Order XXII., r. 1. The registrar refused the application. On appeal to the learned judge he reversed the decision of the registrar.

T. P. Perks, for the defendants. The provision of Order XXII., r. 1, forbidding payment into court together with denial of liability in actions of libel and slander, does not apply to a case where there are two defendants, and one pleads payment into court, and the other denies liability. After the Married Women's Property Act, 1882, a husband and wife sued as in the present case must be treated as two separate defendants. By s. 1, sub-s. 2, of that Act a married woman is rendered

capable of being sued for tort without joining the husband, and any damages recovered against her are payable out of her separate property: *Weldon* v. *Winslow*. (1) Even before the Act the wife was liable personally for a tort committed by her, whether before or during coverture, and in the event of judgment against her might be taken on a ca. sa.; but at common law it was necessary to join the husband in an action for conformity by reason of the supposed unity of person: *Capell* v. *Powell* (2); *Scott* v. *Morley*. (3) If the judgment goes against the husband and wife, her separate estate (if any) will be rendered liable, and therefore she ought to be permitted to defend independently of her husband. There are really two liabilities involved, that of the husband in respect of his own estate, and that of the wife in respect of her separate estate. [He also cited *Earle* v. *Kingscote* (4); *Wainford* v. *Heyl*. (5)]

J. A. Compston, for the plaintiff, was not called on to argue.

COLLINS M.R. I see no ground for interfering with the order of the learned judge. This case appears to me to be quite clear, when once the conclusion is arrived at that the old common law action against the husband and wife jointly in respect of the tort of the wife still exists, and that this is such an action. It was suggested, after the passing of the Married Women's Property Act, 1882, that the effect of it had been in such cases to do away with the old common law action against husband and wife jointly, and that the only right of action thenceforth was against the wife in respect of her separate estate. The question whether that was so arose in *Seroka* v. *Kattenburg* (6), and it was decided in that case by Mathew J. and A. L. Smith J. that the old common law right of action against the husband and wife jointly for the wife's tort continued to exist. That case came up for discussion in the Court of Appeal in *Earle* v. *Kingscote* (4), and was held to have been well decided. In this case the statement of claim appears to

(1) (1884) 13 Q. B. D. 784.
(2) (1864) 17 C. B. (N.S.) 743.
(3) (1887) 20 Q. B. D. 120.
(4) [1900] 2 Ch. 585.
(5) (1875) L. R. 20 Eq. 321.
(6) (1886) 17 Q. B. D. 177.

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me to be framed solely upon the old common law right of action against the husband and wife jointly for the tort of the wife, and the pleader has carefully abstained from introducing anything in the nature of a claim against the wife separately under the Act. The husband by way of defence to the claim so made pleads payment into court without denying liability, and the effect of that is an admission as regards both husband and wife that is incompatible with the subsequent suggestion by the wife that there was no libel by her. In my opinion the judge was quite right in striking out that part of the defence which was inconsistent with an admission of liability.

ROMER L.J. I agree. This being the old common law action against the husband and wife jointly for the tort of the wife, there cannot be separate judgments with regard to the husband and wife. The husband is only liable, and is only sued, in respect of his wife; and, so far as he is concerned, there could only be a judgment against, or in favour of, him and his wife jointly. He is entitled to say that there should be no judgment against him and his wife by reason of the defence which he sets up for both. If such a statement of defence as has been put in here were allowed in an action of this kind, the most anomalous results would follow. On the defence put in by the husband for himself and his wife jointly there might be one judgment against them both, and on the defence put in by the wife for herself alone another and an inconsistent judgment. This is a common law action framed in the ordinary way, and it appears to me that there can only be one defence, and one judgment.

Appeal dismissed.

Solicitors for plaintiff: *Hamlins, Grammer & Hamlin, for H. R. Cousins, Leeds.*

Solicitors for defendants: *Chester & Co., for Craven & Clegg, Leeds.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1904
Jan. 25.

SNEADE *v.* WOTHERTON BARYTES AND LEAD MINING COMPANY, LIMITED.

Practice—Remittal of Action to County Court—Claim originally exceeding 100*l.—Reduction by Amendment of Writ — County Courts Act,* 1888 (51 *&* 52 *Vict. c.* 43), *s.* 65.

Where in an action of contract the claim indorsed on the writ originally exceeded 100*l.*, but the plaintiff obtained leave for an amendment of the writ, by which the claim was reduced to 24*l.*:—

Held, that there was jurisdiction under the County Courts Act, 1888, s. 65, to order the action to be remitted to the county court.

Dierken v. *Philpot*, [1901] 2 K. B. 380, considered.

APPEAL of defendants from an order of Bucknill J. at chambers remitting the action to the county court.

The action was for goods sold and work done, the amount of the claim specially indorsed on the writ having originally been 138*l.* A defence having been put in which set up the Statute of Limitations, the plaintiff applied at chambers for leave to amend the indorsement on the writ by abandoning all but the last item mentioned in the particulars, amounting to 24*l.* only, and altering the indorsement accordingly, and for an order remitting the action to the county court. The master granted leave to amend as prayed on payment by the plaintiff of the costs thrown away by the amendment, but refused to remit the action to the county court. On appeal Bucknill J. reversed the latter part of his decision.

Disturnal and *S. R. C. Bosanquet*, for the defendants. The judge had no jurisdiction under s. 65 of the County Courts Act, 1888, to remit the action to the county court. It has been held in several cases that the question, upon which the jurisdiction to remit an action depends, is whether the action as originally commenced was for an amount exceeding 100*l.* or not; and that a reduction of the amount by payment, or set-off, or in any other way, after action brought cannot give jurisdiction under the section. The case of *Dierken* v.

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Philpot (1) is really on all fours with the present. It was there held that an abandonment by plaintiff of the excess after action brought would not give jurisdiction to remit the action to the county court. No amendment has in point of fact been made in the present case.

[They also cited *Hodgson* v. *Bell* (2); *Foster* v. *Usherwood*. (3)]

J. R. Randolph, for the plaintiff. The actual making of the amendment is mere matter of form which can be done at any time, and must be taken for the present purpose to have taken place. In *Dierken* v. *Philpot* (1) no leave to amend appears to have been obtained, and there was no amendment in the High Court. All the plaintiff did was to abandon the excess in his particulars in the county court. When an amendment is allowed, subject to any terms which may be imposed, the amended writ is substituted for the writ as it originally stood at the commencement of the action. That being so, the case comes exactly within the terms of s. 65, the claim indorsed on the writ not exceeding 100*l*. [He cited *Nottage* v. *Jackson* (4); *Percival* v. *Pedley*. (5)]

S. R. C. Bosanquet, in reply.

COLLINS M.R. This is an appeal from an order of Bucknill J. at chambers remitting an action to the county court. The case is not, in my judgment, covered by the authorities on which the defendants' counsel relied. The action was brought in the High Court for an amount which exceeded 100*l*. After the proceedings had been going on for some time, the plaintiff asked for leave to amend the writ by abandoning the whole of his claim with the exception of an item of 24*l*., and for an order remitting the action to the county court. The master made an order giving the plaintiff leave to amend, but refusing to remit the action to the county court. The leave to amend was upon the terms that the plaintiff should bear all the costs which had been thrown away in consequence of the amendment. The plaintiff appealed against the refusal by the master

(1) [1901] 2 K. B. 380.
(2) (1890) 24 Q. B. D. 525.
(3) (1877) 3 Ex. D. 1.
(4) (1883) 11 Q. B. D. 627.
(5) (1887) 18 Q. B. D. 635.

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to remit the action to the county court. The appeal came before Bucknill J., who reversed the decision of the master in that respect, and made an order remitting the action to the county court. The point now taken is that he had no jurisdiction to make that order under s. 65 of the County Courts Act, 1888. It has been held in a series of cases that, where an action was originally commenced for a sum exceeding 100*l.*, the judge did not obtain jurisdiction to remit the action to the county court by reason of a subsequent reduction of the claim by a payment, or admitted set-off, or otherwise. In one or two cases, for instance, it was held that a payment after action reducing the amount of the claim below 100*l.* did not give the judge jurisdiction under the section. The defendants' counsel contend that those decisions apply to the facts of the present case. In this case, however, the application is not, as it seems to me, based on any reduction of the claim indorsed on the writ by anything subsequent to action, but on the fact that there has been a substitution in due form of law of a claim for 24*l.* for the original claim of 138*l.* It appears to me that the writ as amended becomes for this purpose the original commencement of the action, notwithstanding the fact that the writ originally claimed a larger sum. The reason why the judges have always held that the question on what terms such an amendment should be allowed requires very careful consideration, is that, except in so far as such terms may provide to the contrary, the leave to amend involves that the claim as amended may be treated as if it were the original claim in the action. In this case the amendment was allowed on such terms as the learned judge thought would meet all the equities of the case. Upon that amendment being allowed, the writ as amended becomes the origin of the action, and the claim thereon indorsed is substituted for the claim originally indorsed. This action has now become an action for 24*l.* only, and is precisely the kind of action which ought to be remitted to the county court. There seems to me to be no real substance whatever in the suggestion that, because the plaintiff originally claimed more than 100*l.*, though the claim is now only for 24*l.*, he is placed in a worse position for applying that the case

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should be remitted to the county court on the ground that, the claim being for 24*l.* only, the case is not a proper case to be tried in the High Court. It would, in my opinion, be carrying the effect of the decisions to which we have been referred by the defendants' counsel beyond the principle which underlies them, if we were to accede to the defendants' contention. I can see no reason why a plaintiff should not substitute for a claim originally excessive a smaller claim, and, having done so, should not stand in the same position as if he had not originally claimed an excessive amount. It appears to me that we shall be giving effect to the good sense of the matter, if we hold that an amendment of the writ does not stand for this purpose on the same footing as a payment or set-off subsequent to action brought, which no doubt would not confer jurisdiction under the section. I think that, by reason of having obtained an amendment of his claim, the plaintiff does not come within the decision in *Dierken* v. *Philpot* (1) which has been relied on for the defendants, and the judge had jurisdiction because the action was in fact an action for 24*l.* only. For these reasons I think the appeal must be dismissed.

ROMER L.J. I am of the same opinion for the same reasons.

Appeal dismissed.

Solicitors for plaintiff: *Pritchard, Englefield & Co., for J. P. Court, Liverpool.*

Solicitors for defendants: *Woosnam & Smith, for G. H. Morgan, Shrewsbury.*

(1) [1901] 2 K. B. 380.

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1904
Jan. 21.

MAYOR, ALDERMEN, AND BURGESSES OF NORTHAMPTON *v.* ELLEN.

Water Rate—Equality of Charge—Obligation to charge all Consumers at an equal Rate—Maximum Charge.

The undertaking and powers of a water company were by an Act of 1884 transferred to a municipal corporation. By s. 49 of the company's special Act passed in 1861, the company were empowered to charge for a supply of water for domestic use rates "not exceeding" certain amounts graduated according to the value of the premises, and by s. 59 of the Act it was provided that "the company may from time to time supply any persons with water for any purpose for which such supply is required, for such remuneration, and upon such terms and conditions, as shall be agreed upon between the company and the person desirous of such supply of water, under a special agreement." By s. 36 of the before-mentioned Act of 1884, s. 49 of the Act of 1861 was repealed, and the corporation were empowered to "charge for the supply of water for domestic use to any dwelling-house a sum not exceeding 7½ per centum per annum on the net rateable value of such dwelling-house, as ascertained by the valuation list in force at the commencement of the quarter during which the water rate becomes payable." There was no express provision in either of the before-mentioned Acts requiring equality of rating in respect of the charge made for water to consumers.

The corporation charged to consumers in respect of water supply for domestic purposes in part of their district at the rate of 7½ per cent. and in the remainder of the district at the rate of 5 per cent. upon the rateable value of their respective dwelling-houses. In an action brought to recover the sum charged to a consumer for water at the higher rate:—

Held, reversing the judgment of Bigham J., that no implication arose from s. 36 of the Act of 1884 that the corporation were bound to charge for water at an equal rate in the pound to all consumers, and therefore the fact that they had not done so was no defence to the action.

APPEAL from the judgment of Bigham J. upon a special case stated in an action brought by the plaintiffs to recover from the defendant the sum of 1*l.* 4*s.* 9*d.* in respect of a water rate.

The above-mentioned sum was claimed in respect of water supplied by the plaintiffs for domestic use in the defendant's dwelling-house, situate at Kingsthorpe, a district which had formed part of the area of water supply since 1861, and was

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incorporated with the county borough of Northampton in 1900 as after mentioned. The sum of 1*l.* 4*s.* 9*d.* so claimed was made up by a sum of 1*l.* 0*s.* 3*d.*, being one quarter's instalment of an annual rate of 7½ per cent. upon a rateable value of 54*l.*, and a sum of 4*s.* 6*d.*, being one quarter's instalment of an annual rate of 18*s.*, which was an extra charge for supply to a bath and water-closets. Of the above items the defendant only disputed the first.

In 1884 the plaintiffs, in pursuance of powers conferred on them by s. 19 of the Northampton Waterworks Act, 1882 (hereafter called the Act of 1882), purchased the undertaking of the Northampton Waterworks Company, which company was incorporated by the Northampton Waterworks Act, 1861 (24 & 25 Vict. c. xlvii.), hereafter called the Act of 1861. The said purchase was carried into effect by the Northampton Waterworks Act, 1884 (47 & 48 Vict. c. ccviii.), hereafter called the Act of 1884. The said Acts, together with the Northampton extension order, hereafter referred to, formed the authority for the rates imposed by the plaintiffs for the supply of water within the area designated in the said Acts. The plaintiffs' rate for the supply of water for domestic use was based on s. 36 of the Act of 1884, which was as follows. "Section 49 of the Act of 1861" (by which rates varying with different rateable values were authorized) "is hereby repealed as from September 29, 1884, and the corporation may thenceforward charge for the supply of water for domestic use to any dwelling-house a sum not exceeding 7½ per centum per annum on the net rateable value of such dwelling-house as ascertained by the valuation list in force at the commencement of the quarter during which the water rate becomes payable, or, if there be no such list, then on the net rateable value of such dwelling-house as the same is assessed to the last poor-rate, provided that the corporation shall not be obliged to supply any dwelling-house for a less sum than 2*s.* 6*d.* a quarter; provided also that the term 'dwelling-house,' where used in this Act, or in any Act of, or relating to the company, shall not be construed to mean or include any building used as a dwelling-house, whereof any part is used as a warehouse, or for any trade,

manufacture, or business, or as a workhouse, lunatic asylum, reformatory, infirmary, hospital, or gaol, or other building used for public purposes." There was no section in that, or any of the aforesaid Acts, which gave any specific directions or powers as to either equality or differentiation of rating.

By s. 47 of the Act of 1861, which incorporated the Waterworks Clauses Act, 1847, except ss. 48 to 53, the company was bound, at the request of the owner or occupier of any dwelling-house in any public street within the limits of the Act, in which any service pipe of the company should be laid, to lay down a communication pipe from such service pipe to the premises of such owner or occupier, and furnish to him a sufficient supply of water for domestic use, upon such owner or occupier tendering the quarter's water rate in advance, and the value of the pipes and other fittings, if any, which he might require the company to provide within the premises to be supplied. Sect. 49 of the same Act provided that the company might charge for the supply of water for domestic uses the rates thereinafter named —that is to say, "where the annual rack-rent or value of the premises so supplied with water shall not exceed 6*l.* 10*s.* per annum, at a rate 'not exceeding' 2*s.* per quarter." The section then specified a series of rates rising in gradation with the value of the premises up to "a rate not exceeding" 1*l.* per quarter, in the case of premises whose rent or value should exceed 90*l.*, and not exceed 100*l.* per annum, and, in the case of premises whose rent or value should exceed 100*l.* per annum, "a rate not exceeding" 4 per cent. on the rent or value. Provision was made in the Act for the supply of water by meter to consumers who preferred to be supplied in that way, at certain rates varying according to the quantity of water taken. By s. 59 of the Act it was provided that "the company may from time to time supply any person with water for any purpose for which such supply may be required, for such remuneration, and upon such terms and conditions, as shall be agreed upon between the company and the person desirous of having such supply of water, under a special agreement." The Act of 1884 incorporated the Waterworks Clauses Act, 1847, except the provisions thereof in respect to the amount of profit to be

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received by the undertakers where the waterworks are carried on for their benefit; and the Waterworks Clauses Act, 1863, so far as applicable for the purposes and not inconsistent with the provisions of the Act.

By s. 10 of the Act of 1884 it was provided that "from and after the transfer of the company's undertaking to the corporation, all the rights, powers, authorities, and obligations of the company shall be by virtue of this Act transferred to, vested in, and exercisable by, and imposed upon, the corporation, and the Act of 1861, and the Act of 1882 shall be read, and have effect, as if the corporation had been therein named instead of the company," subject to the provisions of the Act, and to certain exceptions which need not be set forth. Sect. 12 of the Act of 1884 provided that all agreements and contracts affecting the company, and in force at the time of the transfer, should be as binding against, or in favour of, the corporation, as if, instead of the company, the corporation had been a party thereto. Sect. 20 of the Act of 1884 provided that "any moneys borrowed in manner by this section authorized shall be a charge on the net revenue of the water undertaking, and on the district fund, and general district rate, or some or one of them, and such revenue, fund, and rate shall be deemed to be the local rate within the meaning and for the purposes of the Local Loans Act, 1875." Sect. 24 provided that the corporation should keep accounts in respect of the water undertaking separate from their other accounts, and should apply all moneys received by them on account of the revenue to the payment of the working and management expenses, interest on loans, and instalments of the sinking fund in connection with the water undertaking, and that any balance remaining in any year after those payments should be carried to the district fund. Sect. 25 of the Act of 1884 was as follows: "If in any year the amount standing to the credit of the water account be insufficient for the payment of the charges thereon, and the execution of this Act in relation to the water undertaking, the deficiency shall be made up out of the general district rate by carrying an adequate sum therefrom to the credit of the water account, and the corporation from time to time, in preparing

the estimates of the amount required in their judgment to be raised by means of a general district rate for the purposes of the borough, may include therein such sums (if any) as in the judgment of the corporation are necessary to be provided in aid of the deficiency from time to time arising as aforesaid in the water account, and shall collect the same as part of such general district rate." Sect. 37 of the Act of 1884 provided that the corporation should not after the transfer of the water undertaking to them be bound to supply water for domestic use by meter.

The defendant's dwelling-house, in respect of which the charge for water was made, was and had always been within the plaintiffs' statutory area of supply, and the plaintiffs did not contend that any special circumstances existed rendering it less favourably situated than the other dwelling-houses within the said area for purposes of supply or of rating.

In the year 1900 the boundaries of the then borough of Northampton were extended, so as to include (among other areas) that part of Kingsthorpe in which the defendant's dwelling-house was situate. That extension was effected by the Northampton (Extension) Order, 1900, hereafter called the order, contained in the Local Government Board's Provisional Orders Confirmation (No. 14) Act, 1900. By Art. XI. of the order the Acts of 1861, 1882, and 1884 were made applicable to the borough of Northampton as extended by the order. Other articles of the order material to the case were as follows: Art. XII. "All by-laws and regulations, and any list of tolls and table of fees and payments, and scale of charges made by the corporation, which at the commencement of this order are in force in the existing borough shall thenceforth apply to the borough, until, or except in so far as, any such by-laws, regulations, or list of tolls, or table of fees, and payments, and scale of charges may be altered or repealed": Art. XVI. "All property vested in the corporation at the commencement of this order for the benefit of the existing borough shall be held by the corporation for the benefit of the borough, and the corporation shall hold, enjoy, and exercise for the benefit of the borough all the powers which at the date

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aforesaid are exercisable by, or vested in, the corporation for the benefit of the existing borough, and all liabilities which on the date aforesaid attached to the corporation in respect of the existing borough shall from and after that date attach to them in respect of the borough": Art. XXXVI., the material parts of which are as follows: "The general district rates to be levied in the added part of . . . . Kingsthorpe . . . . shall not in any one year during a period of ten years from the commencement of this order exceed such an amount in the pound as, when added to the poor-rate, and to the borough rate, and any other rate made by the corporation in the same year, will in respect of the assessment of any hereditament included in any such rate make up . . . . in the case of the added part of Kingsthorpe a total rate of 5*s.* 6*d.* on each pound of the rateable value of such hereditament."

From the commencement of the operation of the said order up to the time of action the rates levied in the added part of Kingsthorpe (other than the water rate) had continuously amounted, and still amounted, to 5*s.* 6*d.* in the pound. In pursuance of their powers under the aforesaid Acts and order the plaintiffs from the commencement of the said order until June 24, 1901, continued to demand a water rate of 7½ per centum per annum from the defendant and from all other domestic consumers both in the old borough and the added parts. On and after June 24, 1901, the plaintiffs reduced the water rate from 7½ to 5 per centum per annum in the case of those of the said domestic consumers within the boundaries of the old borough, but retained the said rate at 7½ per cent. in the case of the defendant and all other the said domestic consumers in the added parts, including the added part of Kingsthorpe.

This differentiation of the water rate was effected by the plaintiffs in accordance with a recommendation adopted by the Northampton Town Council on April 1, 1901, the material part of which was as follows: "1. To reduce the charge of 7½ per cent. upon the rateable value to 5 per cent., the deficiency to be met out of the district rate. As the district rate for this purpose will only be chargeable within the old borough, it is

obvious that the reduction ought to apply only to the old borough until such time as the rates on the newly added portion cease to be differential. It is estimated that this reduction will leave a sum of about 3500*l.* to be contributed out of the district rate of the old borough."

The plaintiffs stated that they deemed it equitable to effect the said reduction on the ground that a large amount of property in the borough of Northampton, which was rateable to the poor and district rates, and which benefited by the presence of an adequate public water supply for fire extinguishing, and sanitary purposes, did not pay anything towards the cost of the water undertaking, because the owners and occupiers of the said property did not in respect of the same take the water supply of the plaintiffs. As a means of enforcing contribution from the said owners and occupiers, the plaintiffs adopted the said reduction, so that the said owners and occupiers within the old borough would by their contributions to the district rate fund have to make good any deficiency created by the said reduction of the water rate.

There were in the added parts a number of residents who did not take the plaintiffs' water supply for domestic purposes, and whose property was therefore not subject to the payment of water rate.

The plaintiffs contended that they were entitled to refrain from reducing the water rate in the added parts from the 7½ per cent., inasmuch as the ratepayers in the said added parts being privileged from an increase on the district rate for a period of ten years, which period had not yet elapsed, the said ratepayers would bear no part of the extra burden that might be thrown on the district rate of the old borough by reason of any deficiency resulting from such reduction.

The defendant contended, firstly, that the water rate was a rate within the meaning of Art. XXXVI. of the provisional order as before set forth, and that, inasmuch as the poor, borough, and general district rates payable by him amounted together to the maximum sum of 5*s.* 6*d.* in the pound fixed by the said order, the plaintiffs were not entitled to recover from him the said sum of 1*l.* 0*s.* 3*d.* or any other sum in respect of water rate.

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Secondly, in the alternative, the defendant contended that, if he were chargeable with a water rate, the plaintiffs were not authorized to demand of him a higher rate than that demanded in respect of domestic consumers in the old borough taking a similar water supply under similar circumstances: that the differentiation of the water rate as effected by the plaintiffs was contrary to the terms and intention of the Northampton (Extension) Order (1900); that it was not authorized by the Acts of 1861, 1882, or 1884; that it was in breach of the general law of the realm; and that the plaintiffs were bound to place all domestic consumers in the borough on an equality, save in so far as express statutory powers might authorize otherwise. Thirdly, the defendant contended that the plaintiffs were not authorized to estimate for a deficiency on the water account as before mentioned.

The questions for the opinion of the Court were:—

1. Whether the plaintiffs were entitled to differentiate the water rate as before mentioned.

2. Whether the plaintiffs were entitled to demand a water rate of the defendant during the period of ten years from the commencement of the extension order so long as the rates payable by the defendant exclusive of water rate amounted to 5*s.* 6*d.* in the pound.

3. Whether the plaintiffs were entitled to reduce the water rate for the purpose of creating a deficiency on the grounds before stated.

Bigham J. answered the second question in the affirmative, but the first and third questions in the negative, and therefore gave judgment for the defendant.

C. A. Russell, K.C., and *W. Ryland Adkins*, for the plaintiffs. There is no express provision in any of the Acts relating to the plaintiffs' waterworks which provides that there must be equality of rating as in the case of a poor-rate, and no section from which such a provision can be implied. The effect of s. 36 of the Act of 1884, like that of s. 49 of the Act of 1861 which it repealed, is really to fix a maximum rate; but, subject to that maximum, it is left to the company to fix the charge,

and they are not obliged to fix it by an equal pound rate on all consumers. The main object of the section was probably to fix the maximum with reference to the rateable instead of the gross value: see *Dobbs* v. *Grand Junction Waterworks Co.* (1) There are no such antecedent considerations of justice pointing to the necessity for equality in the case of a water rate as there are in the case of a poor-rate. The cost of supplying houses in one part of the district with water may be much greater than in another. The Legislature presumes that the authority supplying water will not act absurdly or capriciously in the matter, and leaves it to them, subject to the limitation imposed by the fixing of a maximum charge, to adjust the charge on the different consumers according to circumstances. It is clear that under s. 59 of the Act of 1861 the corporation has power to make any special agreement they think fit with a consumer for the supply of water at any price. This is altogether inconsistent with the idea that there must be equality of rating. The scope of the Act is that, subject to the maximum, the waterworks shall be worked on a commercial basis.

It is quite clear that the words "any other rate" in Art. XXXVI. of the provisional order do not include a water rate, but only refer to rates for public purposes, ejusdem generis with the general district rate, the poor-rate, and the borough rate.

Assuming the defendant to be wrong in his contention that the plaintiffs have no right to differentiate between consumers in charging the water rate, the question raised as to whether, having regard to the provisions of the Acts and order, the corporation have power to reduce the water rate in the old borough, so as to increase the deficiency chargeable on the general district rate, is really immaterial to the present case. The charge made on the defendant is in that case within the powers of the corporation, and it can be no defence to the action that possibly a ratepayer in the old borough might have a remedy in some form of proceeding against the corporation. The action of the corporation in this respect does not really affect the defendant, assuming that he is wrong on the first

(1) (1883) 9 App. Cas. 49.

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point, for he cannot be called on to pay any more having regard to the provisions of Art. XXXVI.; the only persons who may have grounds for complaint are ratepayers in the old borough who do not take the water supply.

[They cited *Hungerford Market Co.* v. *City Steamboat Co.* (1)]

Avory, K. C., and *Forder Lampard*, for the defendant. The considerations which apply to a water company, supplying water as a commercial speculation, differ from those which apply to a public authority dealing with the supply of water in connection with the general district rate. But it is contended that, dealing with the question as if the corporation merely stood in the same position as a water company, on the true construction of s. 36 of the Act of 1884, the corporation, if they deal with the charge for water by means of a rate, and except so far as they deal with it by special agreement with the consumer, are bound to rate all consumers at an equal rate in the pound. If the plaintiffs' contention is correct, they could arbitrarily charge one dwelling-house in a street twice, or three times as much as the next house, though the value of both and all the other circumstances were precisely the same. The Legislature cannot have intended to give them power to do that.

Even assuming that the corporation could, in making a water rate, differentiate between different parts of their district on account of the greater expense of supply or other difference of circumstances, it is submitted that they cannot do so for the purpose of evading the effect of Art. XXXVI. of the provisional order. The ground alleged by them for differentiating the water rate is that the rates are thereby equalized on the whole district. That is not, having regard to the terms of Art. XXXVI. of the provisional order, a valid ground for their action in reducing the water rate in the old borough, so as to increase the deficiency chargeable on the general district rate. The ratepayers in the added part of Kingsthorpe are prejudiced by their action in this respect, for, but for the deficiency so caused, the total of the general district rate added to the poor-rate, and the borough, and other rates, might not amount to

(1) (1860) 3 E. & E. 365.

5*s.* 6*d.* in the pound. The corporation have no right deliberately to create a deficiency in this way.

[LORD ALVERSTONE C.J. Assuming that the defendant is wrong on the first point, and therefore the corporation had a right to charge him for water at the rate of 7½ per cent., though they were charging other consumers in the old borough less, I do not see how this point can be available as a defence in this action, though possibly, if the action of the corporation in this respect were improper, some other remedy might be open to a ratepayer.]

It is contended that the corporation must make the water rate in accordance with their obligations under the statutory enactments from which they derive their authority as a corporation, both with regard to the supply of water and other matters, in order that the rate may be valid.

[ROMER L.J. It is somewhat material in this connection that under the Act of 1861 water might be supplied by meter, and that s. 36 only applies to the supply of water to dwelling-houses for domestic purposes, leaving the supply of water to other premises for other purposes to be the subject of agreement.]

C. A. Russell, K.C., for the plaintiffs in reply.

LORD ALVERSTONE C.J. In this case Bigham J., as I understand his judgment, has decided that, by virtue of s. 36 of the Act of 1884 and the other sections to which reference has been made, the corporation has no power to differentiate between householders in the borough with regard to the rate in the pound at which the charge for the supply of water to them is to be made. This is a view which has been suggested before, but which has not, so far as I know, ever received judicial sanction before the judgment in this case. There is no doubt that primâ facie there appears to be a great deal to be said in favour of the view that the charge in respect of the supply of water by a public body ought to be at an equal rate to the different consumers, but I have come to the conclusion that the decision of the learned judge in this case cannot be upheld. Another point was raised by the defendant,

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but it appears to me that, unless the judgment of the learned judge to the effect that there must be equality in the charge for water can be supported, no other ground of defence is open to the defendant. I will state as briefly as possible the points which arise, and deal with the arguments addressed to us upon them.

The action was brought to recover a sum of 1*l.* 4*s.* 9*d.*, of which 1*l.* 0*s.* 3*d.* was a quarter's instalment of an annual water rate at 7½ per cent. upon the rateable value of the defendant's house. No question can be raised by the defendant as to the power of the plaintiffs to charge him in respect of water supply at that rate in the pound, as not exceeding the maximum fixed by the Act of 1884. But he says that all other consumers ought to be charged at the same rate, and that, unless they are, the plaintiffs cannot so charge him. He contends that the plaintiffs cannot, apart from special agreement, and relying simply on their statutory powers, make any charge for the supply of water that is not at an equal rate in the pound on the rateable value of the house in the case of all the consumers. That is the main point.

A further point was raised. By virtue of Art. XXXVI. of the provisional order, by which part of Kingsthorpe was added to the borough of Northampton, for a period of ten years the total amount which could be charged upon the added part in respect of the general district rate, the poor-rate, the borough rate, and any other rate, was 5*s.* 6*d.* in the pound. The counsel for the defendant contended that the effect of charging for water only at the rate of 5 per cent. in the pound in the old borough of Northampton was to throw a larger burden on the general district rate than if the charge for water had been at the rate of 7½ per cent. in the pound on all the consumers in the borough; and, that being so, there is a greater likelihood of the amount of the general district rate added to the other rates being maintained at 5*s.* 6*d.* in the pound, and the defendant has less chance of its being reduced below that figure. I do not see how any such point can be raised in this action. As I have pointed out, the defendant does not deny that the charge made upon him for water is

primâ facie a lawful charge so far as he is concerned, but he says that the plaintiffs had no right to reduce the water rate charged to the householders in the old borough, and that the grounds stated in the special case as justifying their action in so doing are not good. It appears to me that, in such a proceeding as this, unless the defendant can make good the main proposition upon which the learned judge's decision is based, namely, that there must be equality in the rate at which the charge for water is made, he is not entitled, in answer to a claim for a specific sum of money, with which it was otherwise lawful to charge him, to put himself in the position of a ratepayer who is complaining of the conduct of the corporation in acting as they did as not being in accordance with the intention of the provisional order. I do not wish to say more on this point than that I can see that there might be some difficulty in any individual ratepayer challenging the action of the corporation in this respect; but, possibly, with the assistance of the Attorney-General, or in some other form of proceeding, the question whether the corporation had a right to reduce the charge for water in the old borough, in order to equalize the total burden of the rates, might be raised. But, however that may be, I am clear that this point cannot be made available by way of answer to the claim of the corporation to make the charge which they have made upon the defendant in the present case.

That brings me to the real point in the case—that is, whether the corporation can differentiate between the charges made to different consumers in respect of domestic water supply; and whether, in an action by them to recover a water rate, the fact that, in the absence of any special agreement, they have charged other consumers at a lower rate than the defendant invalidates the charge, and constitutes a defence to the claim of the plaintiffs. The absence of any equality clause in Waterworks Acts has been frequently referred to, and I think the authority which has been cited, namely, *Hungerford Market Co.* v. *City Steamboat Co.* (1), is important as shewing that it is necessary in order to support the defence in such a case

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that there should be found in the statute some obligation upon the company or other body to deal uniformly with all persons. Such an obligation may be express, or may be implied from the mode in which the statute is framed, or from the essential nature of the charge itself. As regards the powers of the water company before the transfer of their undertaking to the corporation, there were several sections in the Act of 1861 enabling them to make contracts on such terms as might be agreed upon for the supply of water; but it is perhaps sufficient to refer to s. 59, which provides that "the company may from time to time supply any person with water for any purpose for which such supply may be required, for such remuneration, and upon such terms and conditions, as shall be agreed upon between the company and the person desirous of having such supply of water, under a special agreement." If a person had made a special contract with the company, the result of which was that he paid less for water than other consumers were charged for a supply for domestic purposes, could a defendant in that case say that, because the company had made a bargain that another consumer should pay less, the charge on him was invalid? Unless he could, it seems to me that the basis of the argument for the defendant is to a great extent destroyed. In 1884 the water undertaking of the company was transferred to the corporation. Such a transfer is no new thing. It is not a necessary part of the ordinary duty of a corporation to supply water, but the provision of such a supply may be transferred to them for the public benefit. In such cases they may be made subject to exactly the same obligations, and given the same powers and rights, as the company were subject to and possessed. Here the corporation have to keep separate accounts with regard to the water undertaking, and that undertaking is in their hands to be quite distinct from their other functions, except only that it is to have the security of the general district rate for any deficiency on the water account. I need not refer specifically to the provisions as to payment of working expenses, interest on debentures, and the formation of a sinking fund. The undertaking that formerly belonged to the company has now

become the undertaking of the corporation, and all the authorities, rights, and powers of the company are transferred to them, and there is nothing that I can see to shew that the power of making agreements with regard to the supply of water which belonged to the company has been taken away. I think that the effect of the sections, by which the transfer was effected, is that the corporation are placed for this purpose in the same position as the company occupied, so far as their power to deal with consumers is concerned. It was contended that the terms of s. 36 of the Act of 1884, which repealed s. 49 of the Act of 1861, were such as necessarily to give rise to the implication that there must be an equality of the rate of charge in respect of water supply, and that all consumers must be charged at the same rate. I cannot take that view of its effect. I think its effect was really to alter the standard of payments fixed under s. 49. It may be, as suggested by the plaintiffs' counsel, that its object was to substitute rateable value for gross value for the standard. But, whether that is so or not, it appears to me impossible to say that it overrides the power which the corporation as successors of the company would otherwise have of making agreements with consumers as to the supply of water. In the result, what is the position of the defendant? Unless he can say that the charge upon him at the rate of $7\frac{1}{2}$ per cent. in the pound, which primâ facie the plaintiffs had a right to make, as not exceeding the maximum fixed by s. 36, is bad, because there is an obligation to charge equal rates to all consumers, and there has been an arrangement with other consumers, by which they are charged at a less rate than he is, I think he has no defence. In my opinion it is not correct to speak of this corporation as rating in respect of water supply. There may be cases in which that expression could properly be used with regard to a corporation; but in the present case I think they do not rate in respect of water supply in the proper sense of the words, but merely charge a sum, the amount of which is ascertained by reference to a percentage upon the rateable value of the house, and I do not think that s. 36 gives rise to any implication that they must charge all consumers at an

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equal rate in the pound. For these reasons I think the judgment of Bigham J. on this point was wrong. I quite agree with the view which he expressed that the words "any other rate" in Art. XXXVI. of the provisional order do not apply to water rates. The words apply to general rates, such as the general district rate and the poor-rate, and not to a payment like water rate paid for the supply of a commodity.

COLLINS M.R. I am of the same opinion, but, as we are differing from the learned judge in the Court below, I will add a few words. The question in this case is whether the corporation, in charging for domestic water supply, were entitled to differentiate between persons to whom water was supplied, that is to say, to charge in one part of their district at one rate, and in another part at another. The defendant resisted the claim against him for a charge for water at the rate of 7½ per cent. in the pound on the ground that other consumers in another part of the district were only charged at the rate of 5 per cent. in the pound; and Bigham J. upheld his contention.

This charge being imposed under statutory authority, we have to see whether the statute imposes any limitation on the corporation in charging for a supply of water for domestic purposes otherwise than by defining a maximum which they must not exceed, or whether there is some provision that the charge must be made upon all consumers at an equal rate in the pound. It was admitted that there was no express provision to that effect; and the only question, therefore, appears to me to be whether such a provision can be implied from the words of s. 36 of the Act of 1884. I do not think such an implication arises from the words of the section. It repeals a section of an earlier Act, which provided for different standards of charge in relation to different classes of premises according to their values, and provides that "the corporation may thenceforward charge for the supply of water for domestic use to any dwelling-house a sum not exceeding 7½ per centum per annum on the net rateable value of such dwelling-house as ascertained by the valuation list in force at the commencement of the

quarter during which the water rate becomes payable, or, if there be no such list, then on the net rateable value of such dwelling-house as the same is assessed to the last poor-rate." It will be seen that, though the section does use the expression "water rate," there are no other words which indicate any intention that the charge shall be at an equal rate on all houses in proportion to their rateable value. It was contended that the expression "any dwelling-house" must be read as equivalent to "all dwelling-houses." That is a gloss on the words, which, I think, cannot be supported, for the section is capable of being quite easily construed without any such substitution; but, assuming that the section is so read, I do not see that it necessarily imports anything further than the imposition of a limit of 7½ per cent. on the rateable value as a maximum. There are no words in the section importing that the charge must be at an equal rate in the pound on all consumers. The only expression in it which gives any countenance to that suggestion is that the charge is spoken of as a "water rate." I do not think that it is a necessary implication from that expression that the charge must be at an equal rate on all consumers. The basis upon which that implication is suggested is the supposed analogy to a poor-rate. But there is no such analogy. The original statute of Elizabeth, from which the poor-rate derives its origin, no doubt contains no provision for equality in rating, but, having regard to the nature of the charge, the reason for its imposition, and the persons on whom it is imposed, it is obvious that the very essence of the thing involved that the charge on all the ratepayers should be at an equal rate. It is an imposition upon citizens of a duty to the community in proportion to their means, and the character of the duty necessarily involves equality in rating. There is no analogy between such a rate and a charge to be made for a marketable commodity, such as water, which a company is under an obligation to sell, and householders needing it have a right to buy for their individual consumption. The cost of supplying one householder may be different from that of supplying another, and, therefore, there is no such antecedent presumption in favour of equality of rating as there is in

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the case of a charge made on citizens in proportion to their respective means in respect of the performance of a public duty. We have to deal with the case mainly on first principles, the sole ground for the suggestion of the necessity for equality of charge being derived from the expression "water rate," and the fact that the section refers to a percentage on rateable value; but I think that the case of *Hungerford Market Co.* v. *City Steamboat Co.* (1) is to some extent an authority in this case, as being really an instance of the application of the principles which I have endeavoured to indicate. In that case, a company being entitled to make a charge for permission to pass over a part of their property, it was held that there was no obligation upon them to charge all persons at an equal rate, but they were entitled to charge different persons at different rates for what was apparently the same thing. The ground on which that conclusion was arrived at was that there were no words in the statute expressly imposing an obligation to charge equally, and there was no necessary implication of such an obligation from the relation of the parties. Looking to the words which in the present case give the right to impose the charge, I cannot see that any higher implication arises from the use of the word "rate" in this connection than arose from the use of the word "toll" in that case. The words simply indicate a return in the one case for a privilege allowed, and in the other for an article supplied; and in neither case is there the foundation for the presumption in favour of equality of rating which exists in the case of the poor-rate. For these reasons I feel constrained to differ from the judgment of Bigham J.

ROMER L.J. I have come to the same conclusion, and desire to add very little. My first impression was, I must admit, in favour of the view adopted by Bigham J.; but, having heard the case fully argued, and on examination of the various Acts on which the question depends, I have come to the conclusion that there is nothing in the words of those Acts sufficiently strong to justify the Court in saying that the

(1) 3 E. & E. 365.

charge in respect of all houses in the borough for water supplied for domestic purposes must be at an equal rate in the pound. Taking first the provisions of the Waterworks Clauses Act, 1847, which was incorporated with the water company's special Act, I cannot find in that Act anything sufficiently clear to indicate that, whenever what is called a "water rate" has to be paid in respect of dwelling-houses in a district, the amount of the charge must be arrived at by taking an equal percentage on the values of all such houses. It has been pointed out that there is no general principle on which it can be said to be primâ facie only fair that the charge for water on all dwelling-houses should be so calculated. To take one illustration; in the case of two houses of equal rateable value, the cost of supplying one with water may be far greater than the cost of supplying the other; and other illustrations might be suggested to shew that there is no general principle on which an obligation to rate equally can in such cases be implied. There being no such general principle, I can find no special provision in the Waterworks Clauses Act, 1847, that gives rise to such an implication. The definition of "water rate" given in s. 3 as including "any rent, reward, or payment to be made to the undertakers for a supply of water" is somewhat significant for the present purpose. There are provisions in the Act, such as those providing for a tender of the water rate, upon the demand for a supply of water, the effect of which may be somewhat difficult to work out, in the absence of an obligation to rate equally, unless they mean that the maximum amount chargeable must be tendered; but I think a meaning may be given to those provisions without allowing the contention for the defendant to prevail, and on the whole I see nothing in the Act of 1847 to justify our giving effect to that contention. Passing from the Act of 1847 to the special Act of 1861, I think there was nothing in that Act which prevented the water company from charging the occupier of one dwelling-house at a higher rate than the occupier of another. Sect. 59 is not immaterial in this connection. It provides that "the company may from time to time supply any person with water for any purpose

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for which such supply may be required, for such remuneration, and upon such terms and conditions as shall be agreed upon between the company and the person desirous of having such supply of water, under a special agreement." That section seems to contemplate that, by virtue of such an agreement, the company may, if they please, charge certain householders at a less rate than others. It seems to me that what the Act contemplates with regard to dwelling-houses is, not that there shall be an equal rate in the pound, but that a maximum charge shall be fixed, depending upon the rateable value of the house. It is not to be forgotten, in considering this question, that dwelling-houses may not constitute the majority of the premises which require a constant supply of water under the Act. It seems to me impossible to point to any specific provision of the Act as shewing that, under that Act, different dwelling-houses might not be charged at different rates. Then, coming to the Act of 1884, it appears to me, looking to the terms of ss. 10 and 12, that, under that Act, whatever powers the company had under the Act of 1861 the corporation now has. The corporation has simply become the owners of the undertaking that formerly belonged to the company, and has the same rights as they had, subject to the provisions of s. 10. I cannot find any provision in the Act that in my opinion would justify the Court in saying that the main contention of the defendant is correct. With regard to the rest of the case, I desire to add nothing to what my Lord has said.

Appeal allowed.

Solicitors for plaintiffs: *Sharpe, Parker & Co., for Herbert Hankinson, Northampton.*

Solicitors for defendant: *Warren, Murton, & Miller, for Lamb & Stringer.*

E. L.

[IN THE COURT OF APPEAL.]

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Jan. 25.

BORTHWICK *v.* ELDERSLIE STEAMSHIP COMPANY.

Ship—Bill of Lading—Exceptions—Warranty of Seaworthiness, how far excluded.

In a bill of lading, under which frozen meat was shipped for carriage from Melbourne to London, were two exception clauses, the first of which provided that "Neither the steamer, nor her owners, nor her charterers shall be accountable for the condition of goods shipped under this bill of lading, nor for any loss or damage thereto, whether arising from failure or breakdown of machinery, insulation, or other appliances, refrigerating or otherwise, or from any other cause whatsoever, whether arising from a defect existing at the commencement of the voyage or at the time of shipment of the goods or not, nor for detention; nor for the consequence of any act, neglect, default, or error of judgment of the master, officers, engineers, refrigerating engineers, crew, or other persons in the service of the owners or charterers, nor from any other cause whatsoever." The second clause, after specifying certain matters, such as the act of God, the King's enemies, restraints of princes, &c., proceeded as follows: "and loss or damage resulting therefrom, or from any of the following causes or perils, are excepted, namely, insufficiency in packing or in strength of packages, loss or damage from coaling on voyage, rust, vermin . . . . or any other causes beyond the control of the owners or charterers, or by or from any accidents to or defects latent or otherwise in hull, tackle, boilers, or machinery, refrigerating or otherwise, or their appurtenances (whether or not existing at the time of the goods being loaded, or the commencement of the voyage), or insufficiency of coals at the commencement or any stage of the voyage, if reasonable means have been taken to provide against such defects and unseaworthiness."

The ship on a previous voyage had carried horses, and a large quantity of carbolic acid had been used to disinfect her 'tween-decks and holds before the meat was shipped. When the ship arrived at her destination, the meat was tainted with carbolic acid. In an action by indorsee of the bill of lading against the shipowners in respect of the damage to the meat, Walton J. at the trial found that the damage arose through the ship not being in a fit condition for the carriage of the meat at the time of the shipment, by reason of her being tainted with carbolic acid, and that, if proper skill, care, and attention had been used in cleansing and preparing the ship before the meat was shipped, the damage would not have occurred, but he held that the first of the above-mentioned exception clauses relieved the defendants from liability:—

Held, reversing his decision, that the terms of the bill of lading did not exempt the defendants from liability for the damage caused by the unfitness of the ship to carry the goods shipped.

APPEAL from judgment of Walton J. in an action tried by him without a jury.

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The action was by the indorsee of a bill of lading against shipowners for damage to frozen meat shipped under the bill of lading for carriage from Melbourne to London.

The bill of lading, which was on a printed form headed "Refrigerator Bill of Lading," contained two exception clauses, the first of which was printed in Roman type, and the second in small italics. The first clause was as follows: "Neither the steamer, nor her owners, nor her charterers shall be accountable for the condition of goods shipped under this bill of lading, nor for any loss or damage thereto, whether arising from failure or breakdown of machinery, insulation, or other appliances, refrigerating or otherwise, or from any other cause whatsoever, whether arising from a defect existing at the commencement of the voyage or at the time of shipment of the goods or not, nor for detention; nor for the consequence of any act, neglect, default, or error of judgment of the master, officers, engineers, refrigerating engineers, crew, or other persons in the service of the owners or charterers, nor from any other cause whatsoever. The steamer shall be at liberty to jettison the whole of the goods, or any part thereof, if considered necessary on account of decomposition or otherwise." The second clause in smaller print was as follows: "The act of God, the King's enemies, pirates, robbers, thieves by land or sea (but not pilferage), arrests or restraints of princes, rulers, or people, riots, strikes, lock-outs, or other labour disturbances, or delay or hindrance caused directly or indirectly thereby, and loss or damage resulting therefrom, or from any of the following causes or perils, are excepted: namely, insufficiency in packing or in strength of packages, loss or damage from coaling on the voyage, rust, vermin, breakage, leakage, drainage, sweating, evaporation, or decay, resulting from bad stowage, or otherwise, or from the leakage or flow of or from contact with the urine, manure water, or drainage, from horses, cattle, sheep, or other animals carried on the said ship, or from their stalls, however caused, or otherwise howsoever; injurious effects of other goods, whether arising from bad stowage or otherwise; effects of climate, insufficiency of ventilation, or temperature of holds; risk of craft, of

transhipment, and of storage afloat or on shore; fire on board, in hulk, in craft, or on shore; rain, hail, snow, frost, or ice; explosion, barratry, jettison; collision whether with another ship or any other obstacle; stranding, lying upon, or touching the ground; perils of the seas, rivers, or navigation of whatever nature or kind, and howsoever caused; whether or not any of the perils, causes, or things above mentioned, or the loss or injury arising therefrom, be occasioned by or arise from any act, or omission, negligence, default, or error in judgment of the master, pilot, officers, mariners, engineers, crew, stevedores, ship's husband or managers, or other persons whomsoever in the service of the owners or charterers, whether on board the said ship or on shore, or on board any other ship belonging to or chartered by them, or for whose acts they would otherwise be liable, whether such act, omission, negligence, default, or error in judgment shall have occurred before or after the commencement of or during the voyage; or any other causes beyond the control of the owners or charterers, or by or from any accidents to or defects latent or otherwise in hull, tackle, boilers, or machinery, refrigeration, or otherwise, or their appurtenances (whether or not existing at the time of the goods being loaded, or the commencement of the voyage), or insufficiency of coals at the commencement or any stage of the voyage, if reasonable means have been taken to provide against such defects and unseaworthiness."

It appeared that on the two voyages preceding that in question the ship had been employed in carrying horses. These horses were carried in different parts of the ship, and amongst other parts in the 'tween-decks. For the purpose of cleansing the stalls in which the horses were placed during these voyages, and also of disinfecting the 'tween-decks and holds afterwards, a large quantity of carbolic acid had been used. When the ship arrived at her destination and the meat was unshipped, it was found to be tainted with carbolic acid. The learned judge found that the damage to the meat arose from the condition of the ship at the commencement of the voyage rendering her unfit for carriage of the meat by reason of her being tainted with carbolic acid, and not from any accident

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happening in the course of the voyage, and that, if proper care, skill, and attention had been given to the cleansing and preparation of the ship before she started on her voyage from Melbourne, the damage would not have occurred. But he held that the first of the above-mentioned clauses was the governing clause, and could not be considered as cut down by what followed in the second clause; and that by the terms of the first clause the defendants were exempted from liability in respect of the damage to the meat. He therefore gave judgment for the defendants.

Hamilton, K.C., and *Loehnis*, for the plaintiff. It is well settled that the shipowner, in the absence of stipulation to the contrary, warrants under the bill of lading contract that the ship is seaworthy for the voyage, and for this purpose a ship is not seaworthy unless she is fit to carry the goods shipped, and that exceptions contained in exception clauses such as those in the present case primâ facie only apply to matters arising in the course of the voyage: see *Steel* v. *State Line Steamship Co.* (1); *Tattersall* v. *National Steamship Co.* (2); *Owners of Cargo on Maori King* v. *Hughes* (3); *Rathbone Brothers & Co.* v. *McIver, Sons & Co.* (4); and it is also well settled that, in order to exempt himself from his obligation in this respect, or from liability for loss arising through the negligence of his servants, the shipowner must employ absolutely plain and unambiguous language: *Price & Co.* v. *Union Lighterage Co.* (5) According to the general rules of construction the two exception clauses in this bill of lading must, if possible, be read consistently with one another. The small print clause really imports an undertaking by the shipowners that the ship shall be seaworthy for carriage of the goods, except so far as is provided to the contrary by that clause; that is to say, that she shall be seaworthy so far as the use of reasonable means can make her so. The large print clause ought not primâ facie to be read as overriding the small print clause, and really

(1) (1877) 3 App. Cas. 72.
(2) (1884) 12 Q. B. D. 297.
(3) [1895] 2 K. B. 550.
(4) [1903] 2 K. B. 378.
(5) [1903] 1 K. B. 750.

contradicting it. It is submitted that the two clauses can be read together. The words "or from any other cause whatsoever, whether arising, &c.," in the large print clause are not to be read disjunctively as coupled with "loss or damage thereto," but as being really a qualification of the immediately preceding exception as to failure or breakdown of machinery, &c., and relating to matters ejusdem generis with such failure or breakdown: see *Rathbone Brothers & Co.* v. *McIver, Sons & Co.* (1) The object of the words is to extend that exception, and to make it clear that it applies to defects existing at the commencement of the voyage, or when the goods are shipped, as well as those arising in the course of the voyage, which primâ facie it would not do. Having regard to their position in the clause, the words cannot have been intended entirely to exclude any liability of the shipowners with regard to the seaworthiness of the ship for the carriage of the goods shipped: *In re Richardsons and Samuel & Co.* (2)

Carver, K.C., and *Leck*, for the defendants. The small print clause does not import any positive undertaking by the shipowners as to seaworthiness. It is simply an exception clause, and, so far as it does not qualify the common law obligation of the shipowners in that respect, it simply leaves it as it was before. There is therefore really no substantial inconsistency involved in the construction put by the learned judge on the bill of lading. The small print clause cuts down the warranty of seaworthiness to a certain extent, and that exemption is extended further by the large print clause. There is no question of any derogation by the large print clause from any express undertaking contained in the small print clause. Having regard to the way in which documents like bills of lading are framed in the course of commercial business, and in which these exceptions are inserted from time to time in old forms, no doubt the various clauses do not always fit in with one another with the greatest nicety; but, if the terms of the large print clause do plainly cover the damage that occurred in the present case, as, it is submitted, they do, then the learned judge in the Court below was right in giving effect to them as

(1) [1903] 2 K. B. 378. (2) [1898] 1 Q. B. 261.

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overriding the words of the small print clause. The words "loss or damage . . . . from any other cause whatsoever, whether arising from a defect existing at the commencement of the voyage or at the time of the shipment of the goods or not," do in their ordinary signification plainly cover the damage that occurred in this case. It is impossible grammatically to construe the clause as suggested by the plaintiff.

Hamilton, K.C., for the plaintiff, in reply.

LORD ALVERSTONE C.J. With great deference to the opinion of the learned judge, especially in a case of this kind, I have come to the conclusion that he did not give sufficient effect to certain broad considerations, which should be borne in mind in construing documents. It appears to me to be true with regard to a bill of lading, as with regard to any other legal document, that, where there are several clauses, as far as possible they must be construed consistently with one another, and one of them ought not to be treated as surplusage, and rejected, unless it is impossible to read it with other clauses. Another general consideration is that which was expressed by Vaughan Williams L.J. in *Rathbone Brothers & Co.* v. *McIver, Sons & Co.* (1) in the following terms: "Before I go into the case in detail I wish to point out the broad principle, which I think ought to be applied in the construction of a bill of lading, or indeed of any other contract relating to carriage of goods by sea, for instance, a charterparty. The principle was laid down by Bigham J., and by the Court of Appeal, in *Owners of Cargo on Waikato* v. *New Zealand Shipping Co.* (2) to the effect that, with reference to the carriage of goods by sea, the law implies certain warranties on the part of the shipowner. It puts upon him certain obligations, which will always bind him, unless there are in the contract clear and express words, which without ambiguity relieve him from that which I may call his common law obligations." Romer L.J. in that case also expressed the same principle as follows: "As I understand, shipowners have been for a long time endeavouring to limit

(1) [1903] 2 K. B. 378. (2) [1898] 1 Q. B. 645; [1899] 1 Q. B. 56.

the general liability cast upon them by law as carriers by sea, by inserting special exceptions, without going the length of excepting their liability in respect of the warranty of seaworthiness, and they have been, as I understand, from time to time extending the special exceptions. I think, however, I am right in saying that, as a principle of construction, the warranty of seaworthiness will be held not to have been excepted, unless it plainly appears that it was intended to except it. In other words, the Court will not readily infer an exception of that warranty."

Those two passages appear to me to state in clear language the general principle of construction applicable to these documents. Here the learned judge does not seem to me to have given sufficient effect to that which has been called the small print clause, which expressly deals with the question of warranty of seaworthiness. I agree with the argument of the defendants' counsel up to a certain point. They said that the small print clause leaves things where they were at common law with regard to the warranty of seaworthiness, except so far as it expressly provides to the contrary: that it exempts the shipowners in respect of loss or damage resulting "from defects latent or otherwise in hull, tackle, boilers, or machinery, refrigerating or otherwise, or their appurtenances (whether or not existing at the time of the goods being loaded, or the commencement of the voyage), or insufficiency of coals at the commencement or any stage of the voyage, if reasonable means have been taken to provide against such defects and unseaworthiness," but, except so far as that exemption extends, it leaves the common law warranty of seaworthiness still existing. So far I agree with the argument of counsel for the defendants, but I cannot follow them in the contention, which forms the further step in their argument, namely, that the large print clause is intended to be an overriding clause, and to exempt the shipowners from all liability for unseaworthiness, whether arising from a defect existing at the commencement of the voyage or not, and however occasioned, notwithstanding the fact that by the small print clause the shipowners are only protected to a limited extent, namely, if

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Lord Alverstone C.J.

reasonable means have been taken to provide against unseaworthiness. Giving to the large print clause the fullest meaning of which, fairly construed, it is capable, I am unable to come to the conclusion that it exempts the shipowners from liability for damage occasioned by unseaworthiness absolutely, or to the extent necessary to include that which has occurred in this case. The clause provides that the shipowners shall not be liable "for the condition of goods shipped under this bill of lading, nor for any loss or damage thereto, whether arising from failure or breakdown of machinery, insulation, or other appliances, refrigerating or otherwise." It then goes on: "or from any other cause whatsoever, whether arising from a defect existing at the commencement of the voyage or at the time of shipment of the goods or not." It is material to observe that the clause subsequently deals with "the consequence of any act, neglect, default, or error in judgment of the master, officers, engineers, refrigerating engineers, crew, or other persons in the service of the owners or charterers." Having regard to the position of the words "or from any other cause whatsoever, whether arising, &c.," in the clause, the language cannot, in my opinion, be regarded as framed with a view to excluding once and for all any liability for loss or damage occasioned by unseaworthiness of the ship. The words immediately follow part of the clause which relates specially to "failure or breakdown of machinery, insulation, or other appliances, refrigerating or otherwise," and I think it is clear that they should be construed as relating to matters ejusdem generis with such failure or breakdown, and not as a general provision exempting the shipowners altogether from any liability for unseaworthiness of the ship for the purpose of carrying the goods. I read the clause as protecting the shipowners from all liability for loss or damage arising from failure or breakdown of machinery, insulation, or other appliances, or from any other similar cause whatsoever, and whether arising from a defect existing at the commencement of the voyage or not. I adopt the contention of the plaintiff's counsel that the words "or from any other cause whatsoever, whether arising, &c.," were inserted for the purpose of extending the protection

afforded to the shipowners by the earlier words "failure or breakdown of machinery," and making it clear that it was to apply, whether such failure or breakdown or other similar cause arose from a defect existing at the commencement of the voyage or not. In this case the learned judge has found that, the ship being tainted with carbolic acid, she was at the commencement of the voyage unseaworthy, in the sense of being unfit for the carriage of a delicate cargo like meat. That being so, upon the narrower construction which must be put on the large print clause, it follows that the defendants are liable, because under the small print clause they are only exempted from liability for damage occasioned by unseaworthiness, if reasonable means have been taken to provide against it, which is found not to have been the case here.

For these reasons I think the appeal must be allowed.

COLLINS M.R. and ROMER L.J. concurred.

Appeal allowed.

Solicitors for plaintiff: *Waltons, Johnson, Bubb & Whatton.*
Solicitors for defendants: *Lowless & Co.*

E. L.

C. A.
1903
Dec. 17.

[IN THE COURT OF APPEAL.]

HIGGINS *v.* CAMPBELL & HARRISON, LIMITED. TURVEY *v.* BRINTONS, LIMITED.

Employer and Workman—Workmen's Compensation—Accident arising out of and in the course of Employment—Disease communicated by Material worked on—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1.

A workman employed in a wool-combing factory, in which there was wool which had been taken from sheep infected with anthrax, contracted that disease by contact with the anthrax bacillus which was present in the wool. On an application for compensation under the Workmen's Compensation Act, 1897:—

Held, that the workman was injured by accident arising out of and in the course of his employment within the meaning of s. 1 of the Act.

APPEALS from judgments of the judges of the county courts of Bradford and Kidderminster on applications for awards of compensation under the Workmen's Compensation Act, 1897.

The question in each case was whether a workman who contracted the disease called anthrax, while employed in a wool-combing factory, in which there was wool which had been taken from sheep that had suffered from anthrax, and was infected with the bacillus of that disease, was injured by an accident arising out of and in the course of his employment within the meaning of s. 1 of the Workmen's Compensation Act, 1897.

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The applicant in this case was a workman in the employment of the respondents in their wool-combing factory at Bradford. The duty of the applicant was to run wool in little cars to a place in the factory at which it was to be washed. In doing this he had to pass a place in the factory at which there was wool from Persia. It appeared that wool from the East, and especially Persian wool, is liable to be infected with the bacillus of anthrax, and the applicant contracted that disease. He had a pimple on his neck which was rubbed by

his collar, and the medical evidence pointed to the settlement of a germ on the raw surface on the neck of the applicant resulting in cutaneous anthrax, which was surgically treated, and the applicant after a time recovered. It appeared that anthrax was somewhat prevalent among Persian sheep and goats, and that when the infected animals were killed their skins were packed with other skins, and, being imported into this country, introduced the bacillus of anthrax. Although Persian wool did not necessarily contain the germ, workmen employed in wool-sorting are subject to the risk of taking this disease, and their occupation is an unhealthy employment in respect of which regulations have been made for the protection of the workmen under the Factory Acts.

The county court judge gave judgment as follows: "Some restriction must be put on the words 'personal injury by accident,' or else if a workman caught scarlet fever by infection from the workman working next him he would be entitled to compensation. Such an illness would be a personal injury, and certainly would not be inevitable, since certain persons only and in certain circumstances are liable to the infection. It has always been held, however, that there is a distinction between accidents and disease, and it is generally understood that disease as such does not come within the statute. It seems to me that the Act only applies if the accident itself causes the personal injury. In the present case the accident was an anthrax germ alighting on a raw surface or cut on the applicant's body, and that in itself caused no injury. It was the disease that arose from the germ multiplying in the blood that was the cause of the injury; and this, I think, is not within the Act." The learned judge accordingly dismissed the application.

The applicant appealed.

J. J. Wright, for the applicant. This case comes within the principle laid down in the House of Lords in *Fenton* v. *Thorley & Co.* (1) The applicant was accidentally inoculated with the bacillus of anthrax, and the injury to him was a "mishap or

(1) [1903] A. C. 443.

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untoward event not expected or designed." There was nothing inevitable in the case, for not all of the wool handled is infected, and infected wool does not necessarily communicate disease. The Court of Session in Scotland in *Stewart* v. *Wilsons and Clyde Coal Co.* (1) decided that a miner who strained his back in replacing a derailed coal hutch had been injured by an accident, and that decision was approved by the House of Lords in *Fenton* v. *Thorley & Co.* (2) There was in that case nothing external to which the injury was attributable, but it was due to an internal strain. There can be no essential difference between the present case and that of a workman who is cut by an infected knife; yet in the latter case it could not be doubted that the injury arose from an accident. It makes no difference whether the injury is done by some microscopic organism or by something of appreciable size.

S. T. Evans, K.C., and *Minton-Senhouse*, for the respondents. The question in the case is whether the injury to the applicant was caused by accident or by disease. In the latter case it does not come within the Act. The distinction between the two cases is pointed out by Lord Macnaghten in *Fenton* v. *Thorley & Co.* (3), where he says that the words "by accident" are introduced to qualify the word "injury," confining it to a certain class of injuries and excluding other classes, as, for instance, injuries by disease, or injuries self-inflicted by design. The disease contracted by the applicant was a possible and perhaps ordinary incident of the class of work he was engaged on, but it was not caused by "accident." If it were otherwise, all diseases contracted in the course of work would be included in the Act, contrary to the view expressed by Lord Macnaghten. There is nothing in the opinions delivered by the other learned Lords which qualifies the opinion so expressed in the passage which couples "disease" with self-inflicted injuries. The contrast between an accident which happens in the course of the work and the contracting of a disease may be further illustrated by the fact that there are occupations in which the workman is subject to liability to

(1) (1902) 5 F. 120.
(2) [1903] A. C. 443.
(3) [1903] A. C. 443, at p. 448.

catch a cold leading to influenza or pneumonia, yet it could hardly be argued that the injury caused to him by either of these diseases arose from accident.

J. J. Wright, in reply. In the passage quoted from Lord Macnaghten's judgment, self-inflicted injuries which do not arise out of the employment are classed with diseases; but clearly the diseases meant are those of which it may also be said that they do not arise out of the employment, such, for instance, as infectious diseases communicated by a fellow-workman, or contracted elsewhere than at the place of employment.

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The applicant was the widow of a workman in the employment of the respondents in their factory as a wool-sorter. He was opening bales of Persian wool, and contracted anthrax in one of his eyes and died from the effect of the disease.

The learned judge gave his decision as follows: "I find as a fact that the anthrax which was the immediate cause of death was caused by the accidental alighting of a bacillus from the infected wool on a part of the deceased person which afforded a harbour in which it could multiply and grow, and so cause malignant disease and consequent death. I can see no distinction in principle between the accidental entry of a spark from an anvil, or the accidental squirting of scalding water or some poisonous liquid into the eye. The only difference is that in those cases the foreign substance would be so large as to be visible, while in this case the foreign substance was microscopic. I think it immaterial whether there was in fact any external pimple or abrasion, because if there was it was a fortuitous accident that the bacillus alighted on that particular spot. But I find as a fact that there was no such abrasion or pimple. My judgment is based on the fact that there was in this case a fortuitous intrusion of a foreign substance into the eye which by its presence there caused death. I should have held otherwise if the deceased had voluntarily handled the wool with abraded hands, because in that event I should have thought the fortuitous element absent."

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The learned judge accordingly made an award of compensation.

The employers appealed.

Ruegg, K.C., and *Albert Parsons*, for the employers. The only question is whether an injury by disease can be said to be an injury by accident. Injury by disease is outside the scope of the Act. In Lord Macnaghten's opinion, delivered in *Fenton* v. *Thorley & Co.* (1), disease and self-inflicted injuries are classed together. To support the view that the employers are liable under the Act, the classification of disease with self-inflicted injuries would require to be limited by the addition of words such as "unless the disease arises out of the work." The question of responsibility in case of disease has been dealt with in various bills that have been introduced in Parliament since 1897, and this indicates that disease does not come within the Workmen's Compensation Act of that year. The Factory and Workshop Act, 1901, draws a broad distinction between accidents and diseases which are subject to different regulations as to notice and other matters. Part I., under the heading, "Health and Safety—(iii.) Accidents," applies to the former, and Part IV. deals with dangerous and unhealthy industries, and s. 73 mentions this disease. The distinction is therefore well established by the Legislature, and it cannot have been intended to include disease as an accident within the Act of 1897.

J. S. Pritchett, for the applicant. By the decision in *Fenton* v. *Thorley & Co.* (2), not only was *Hensey* v. *White* (3) overruled, but also *Walker* v. *Lilleshall Coal Co.* (3), reported with it. If so, a case of blood-poisoning by red-lead is within the statute, and there can be no difference between such a case and a case of blood-poisoning by contact with anthrax germs. The class of disease indicated by Lord Macnaghten and grouped with self-inflicted injuries is that in which the element of accident in the course of the employment is excluded. There can be no question that to suffer from anthrax is a

(1) [1903] A. C. 443, at p. 448. (2) [1903] A. C. 443.
(3) [1900] 1 Q. B. 481.

personal injury, and in this case it was caused by the accidental incursion of an anthrax germ, and there was an injury by accident. The disease was contracted from the materials of the employers on which the workman was employed, and everything necessary to bring the case within the statute is present.

Ruegg, K.C., in reply.

COLLINS M.R. These two cases raise the same point, which has been differently decided by the two learned county court judges.

In the first case a workman, who had a pimple on his neck, was brought into contact with wool which was in an infectious condition and caught anthrax. He sustained injury thereby, but recovered. The learned county court judge held that there was no accident, and that the case did not fall within the Workmen's Compensation Act. In the second case a workman, who apparently had no discoverable break in his skin, was also brought into contact with infected wool, and it seems to have affected his eye and so obtained access to his body. At all events he got anthrax, the seat of which was his eye, and he died from that disease. The learned county court judge decided that the case was within the Act, and awarded compensation.

The principle upon which suggested accidents of this kind were dealt with until the decision of the House of Lords in *Fenton* v. *Thorley & Co.* (1) has been changed, or at all events modified by that decision, and we must look to that case as the expression of the opinion of the highest tribunal as to the interpretation to be put upon the word "accident" in the Act, and we must discard the view taken by this Court in *Hensey* v. *White* (2), which was overruled. Whether the decision involves the overruling of the other cases which are bracketed with *Hensey* v. *White* (2) I do not stop to consider, but, so far as there was one common principle applied in this Court to the three cases, it seems to me that it has been overruled, and we must deal with the matter with the aid of the decision of the House of Lords.

(1) [1903] A. C. 443. (2) [1900] 1 Q. B. 481.

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Collins M.R.

I propose to deal first with the second of the cases before us, because the judgment in that case puts very clearly the ground on which the learned judge held that an accident had happened. He says: "I find as a fact that the anthrax which was the immediate cause of death was caused by the accidental alighting of a bacillus from the infected wool on a part of the deceased person which afforded a harbour in which it could multiply and grow, and so cause malignant disease and consequent death. I can see no distinction in principle between the accidental entry of a spark from an anvil or the accidental squirting of scalding water or some poisonous liquid into the eye. The only difference is that in those cases the foreign substance would be so large as to be visible; in this case the foreign substance is microscopic."

That judgment appears to me to be well founded in logic and in principle, and to fall within that which the House of Lords have laid down in *Fenton* v. *Thorley & Co.* (1) The principle laid down in the opinion of Lord Macnaghten is this (2): "I come, therefore, to the conclusion that the expression 'accident' is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed." Had the passage ended with the words "popular and ordinary sense," there might be some difficulty, because it might be said that the catching of an infectious disease was not in the popular sense of the word an accident; but the learned Lord goes on to explain what he means by the expression "popular and ordinary sense" in which the word "accident" is to be construed in this Act. It denotes an unlooked-for mishap or an untoward event which is not expected or designed; and, tried by that standard, that which happened to the workman in this case was surely an accident, for it was an unlooked-for mishap or an untoward event which was not expected or designed.

We were pressed with an argument founded on an earlier passage in the opinion of the learned Lord at the top of p. 448 of the report. He says: "Now the expression 'injury by accident' seems to me to be a compound expression. The

(1) [1903] A. C. 443. (2) [1903] A. C. at p. 448.

words 'by accident' are, I think, introduced parenthetically as it were to qualify the word 'injury,' confining it to a certain class of injuries, and excluding other classes, as, for instance, injuries by disease or injuries self-inflicted by design." I do not think that the word "disease" used in that collocation was meant to have the significance which the learned counsel seek to attribute to it. It seems to me that the learned Lord was dealing with two things—the one, injuries self-inflicted by design, into which the element of accident does not come; the other, disease existing in the condition of the workman. If a disease were brought with a workman to his work, and he were to die of that disease so brought with him, he could not be said to die of an accident. The expression does not seem to me to cover the accidental catching of infection arising out of the work, or receiving accidentally a blow which is a physical blow, though infinitesimal in force and given by a bacillus invisible to the naked eye. The incursion of such a physical cause seems to me to come within the words in which the learned Lord has defined an "accident" as that term is used in this Act. I do not consider that this view is displaced by the antecedent passage as to disease that has been relied on which, I think, is meant only to cover a source of injury that is not accidental in the same sense that a self-inflicted injury cannot be an accident arising out of the employment, the source of injury in the former case being a disease brought with him to his work by the workman. It was pointed out in the course of the argument that obviously not every injury caused by sickness could be said to arise out of and in the course of the employment. In the case with which we have to deal we find that the particular infection or contagion came upon the workman directly out of as well as in the course of his employment. Contact with the infected wool was part of his business, and was the direct cause of his receiving the infection. It seems to me, therefore, that both these cases fall within the principle laid down in *Fenton* v. *Thorley* (1) in the House of Lords, and within the definition given by Lord Macnaghten in that case. Lord Shand concurred in the judgment of Lord Macnaghten.

(1) [1903] A. C. 443.

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Collins M.R.

He said (1): "Concurring as I fully do in holding that the word 'accident' in the statute is to be taken in its popular and ordinary sense, I think it denotes or includes any unexpected personal injury resulting to the workman in the course of his employment from any unlooked-for mishap or occurrence." I need not refer in terms to the opinions of the other Law Lords, which contain nothing inconsistent with those that I have quoted.

On these grounds I am of opinion that there was an accident to the workman within the Workmen's Compensation Act in each of these cases; and, therefore, the judgment in the first case will be reversed, and that in the second case upheld.

MATHEW L.J. I am of the same opinion. It appears to me that since the decision in the House of Lords in the case of *Fenton* v. *Thorley & Co.* (2) there is no difficulty in dealing with this case, and I propose only to deal with this case. A number of illustrations, each of which was more difficult than the case before us, were brought to our notice, but I do not propose to follow the learned counsel into those cases. The decision of the House of Lords came to this—that, where the injury to the workman arises from a cause which is unforeseen, the element which constitutes an accident within the meaning of the Act arises. In *Hensey* v. *White* (3) this Court thought that the injury to the workman was inevitable—that is, that it was due to the man's physical infirmity and weakness—and, therefore, that the element of accident involving the idea of something fortuitous or unexpected was wanting. The House of Lords overruled the judgment of this Court and made the law, as it seems to me, clear. But it is the misfortune of the learned Lords, as it is of judges elsewhere, sometimes to let fall expressions in the course of their judgments not in the least meant to qualify the decision about to be pronounced, but which are said to take away the greater part of its value. In this case there has been found a phrase in the opinion given by

(1) [1903] A. C. at p. 451. (2) [1903] A. C. 443.
(3) [1900] 1 Q. B. 481.

Lord Macnaghten which has been the source of a great part of the discussion that we have heard. The sentence on which comment was made is as follows: "The words 'by accident' are, I think, introduced parenthetically as it were to qualify the word 'injury,' confining it to a certain class of injuries, and excluding other classes, as, for instance, injuries by disease or injuries self-inflicted by design." It was argued upon this passage that the decision was fatal to the claim of the workman, because his injuries were due to disease, and disease of every sort is excluded from the purview of the Act. It seems to me that is a misconstruction of the language that I have quoted, and that the reference was to something that may be treated as inevitable—as, for instance, a workman bringing a disease with him to his work and suffering injury from that disease. It is plain that such a case is not within the principle that was laid down, for the injury might not be unforeseen, and it would be inevitable. I adopt the description of an accident given by Lord Macnaghten, which is in accord with the view of Lord Lindley, in a passage in which he says (1): "Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss."

Now what are the facts? It was an accident that the workman, in dealing with the wool, was brought in contact with that which might infect him with this disease of anthrax, and it was a further accident that the disease attacked him. Both cases are therefore covered by the principle laid down in the House of Lords, and judgments must be entered in the way pointed out by the Master of the Rolls.

COZENS-HARDY L.J. I am of the same opinion, and but for the great importance of this case I should be content not to add a word to the judgments that have been given. It is not necessary for me to say at what conclusion I should have arrived if I had not had the benefit of the judgment of the House of Lords, and I think it right to remark that the judgment of the county court judge in the first of these cases was given before the decision of the House of Lords, and while the

(1) *Fenton* v. *Thorley & Co.*, [1903] A. C. 443, at p. 453.

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Cozens-Hardy L.J.

decisions of this Court in *Hensey* v. *White* (1) and in subsequent cases were binding upon him. But, having regard to the decision in *Fenton* v. *Thorley & Co.* (2), I do not think it is open to us to take the same view that the learned county court judge took. It seems to me that on the facts of this case we have something unexpected arising by reason of dealing with raw materials in the process of manufacture in which the workman was engaged. The injury to him was therefore an accident arising, not merely "in the course of," but "out of" his occupation. It arose from the handling either by this workman or by some others, of raw material used in the process of manufacture. I desire to emphasize this, because many of the illustrations—and very ingenious illustrations they were—put forward in argument, some of which no doubt fell from the bench, raised questions which are in no way covered by this decision. Speaking for myself, I should be very sorry to hold that every disease contracted by a workman on the premises is a disease contracted in the course of the employment, or as a result arising from accident in the course of employment. It is not, however, necessary to consider that question more in detail. I only desire to guard myself on that point by saying that in the present case, where the infection was due to raw materials handled by this workman or by some of his fellow-workmen, it seems to me that it is not open to us to say that that was not an injury arising out of the employment within the decision of *Fenton* v. *Thorley & Co.* (2)

Appeal in Higgins v. *Campbell & Harrison allowed.*

Appeal in Turvey v. *Brintons, Limited, dismissed.*

Solicitors for applicants: *Wrensted & Hind, for W. H. Scott, Bradford; Robbins, Billing & Co., for W. Waldron, Brierley Hill.*

Solicitors for respondents: *Wynne, Baxter & Keeble; Helder, Roberts & Co., for Tunbridge & Co., Birmingham.*

(1) [1900] 1 Q. B. 481. (2) [1903] A. C. 443.

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1904
Jan. 13.

NEAGLE *v.* NIXON'S NAVIGATION COMPANY, LIMITED.
EDWARDS *v.* GUEST, KEEN & NETTLEFOLDS, LIMITED.

Employer and Workman—Workmen's Compensation—Obligation to submit to Medical Examination—Medical Referee—Condition precedent to Claim for further Compensation—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *Sched. I., clause* 11.

The provision in clause 11 of the First Schedule of the Workmen's Compensation Act, 1897, for suspension of the payment of compensation, "if the workman refuses to submit himself to such examination," refers to the examination to which, under that clause, the workman may be required by the employer to submit, namely, an examination by a medical practitioner provided by the employer, or, if the workman prefers it, by one of the medical referees appointed under the Second Schedule of the Act, and not to the examination by one of the medical referees, to which the clause gives the workman an option to submit, if dissatisfied by the certificate of the medical practitioner provided by the employer: and, therefore, it is not a condition precedent to the workman's right to claim further compensation that he should have exercised that option.

APPEALS from decisions of county court judges in proceedings under the Workmen's Compensation Act, 1897.

The appeal in the first of the above cases was from an order of the judge of the Merthyr Tydfil County Court staying proceedings under the Workmen's Compensation Act, 1897, as after mentioned.

A workman having been injured by an accident arising out of and in the course of his employment, notice of the accident was given to his employers, and for some time they made weekly payments to the workman by way of compensation. After a while they required him to submit himself for examination by a medical practitioner provided by them under clause 11 of the First Schedule of the Workmen's Compensation Act, 1897. He did so, and the medical practitioner certified that he had recovered from the effects of the accident,

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and was able to resume work. The employers communicated the certificate to him, and gave him notice that, if dissatisfied with it, he might, under clause 11 of the First Schedule of the Act, submit himself for examination by one of the medical referees appointed under the Second Schedule, and, if he failed to do so, the weekly payments made to him would be suspended. He did not submit himself for examination by a medical referee, and the employers consequently discontinued the weekly payments to him. He then filed a request for arbitration under the Workmen's Compensation Act, 1897. The employers thereupon applied to the county court judge to stay all proceedings in the arbitration until the workman should submit himself for examination to a medical referee in accordance with clause 11 of the Workmen's Compensation Act, 1897. The county court judge granted the application.

The appeal in the second case was from a decision of the judge of the Pontypool County Court.

The facts in that case were similar to those in the first, with the exception that in that case the county court judge refused to stay the proceedings. (1)

S. T. Evans, K.C., and *Rhys Williams* (*Sankey* with them), for the workman in the first case. The case turns upon the construction of clause 11 of the First Schedule to the Work-

(1) Clause 11 of the First Schedule to the Workmen's Compensation Act, 1897, provides that—"Any workman receiving weekly payments under this Act shall, if so required by the employer, or by any person by whom the employer is entitled under this Act to be indemnified, from time to time submit himself for examination by a duly qualified medical practitioner provided and paid by the employer or such other person; but, if the workman objects to an examination by that medical practitioner, or is dissatisfied by the certificate of such practitioner upon his condition when communicated to him, he may submit himself for examination to one of the medical practitioners appointed for the purposes of this Act, as mentioned in the Second Schedule to this Act, and the certificate of that medical practitioner as to the condition of the workman at the time of the examination shall be given to the employer and workman, and shall be conclusive evidence of that condition. If the workman refuses to submit himself to such examination, or in any way obstructs the same, his right to such weekly payments shall be suspended until such examination has taken place."

men's Compensation Act, 1897. That clause makes it obligatory on the workman to submit to a medical examination, if required to do so by the employer. That examination is to be by a medical practitioner provided and paid by the employer, or, at the option of the workman, if he prefers it, by one of the medical practitioners appointed for the purposes of the Act under the Second Schedule, called in the rules "medical referees." That is the only examination which is made obligatory on the workman by the clause. The clause further gives an option to the workman to submit himself for examination to one of the medical referees, if, having submitted himself to examination by the medical practitioner provided by the employer, he is dissatisfied by the certificate of that practitioner; but it imposes no obligation upon him to do so. The use of the word "shall" in the first sentence of the clause, contrasted with that of the word "may" in the subsequent part of it, clearly shews that the latter is only intended to confer on the workman an option for his benefit, and not to impose upon him an obligatory condition. It would be a hardship, if, after submitting to examination by a medical practitioner provided by the employer, he were, in the event of the certificate of that practitioner being unfavourable to him, compelled, before he could take proceedings to obtain further compensation, to submit also to examination by a medical referee, which he could only do at his own expense, and subject to the condition that the certificate of the referee would be conclusive. There is no provision under the Act or rules for the payment of the medical referee's fee for such an examination by the employer or otherwise than by the workman. The words, "If the workman refuses to submit himself to such examination," in the latter part of clause 11, clearly import that the examination referred to is the one to which the employer can require the workman to submit, and to which he is bound to submit under the clause, that is to say the examination by the medical practitioner provided by the employer, or, if he prefers it, by a medical referee in the first instance, in substitution for that practitioner. The words cannot refer to the examination which the workman has merely the option of submitting to, if

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dissatisfied by the certificate of the medical practitioner provided by the employer.

[They referred to the Workmen's Compensation Act, 1897, Sched. I., clause 3, Sched. II., clause 13; Workmen's Compensation Rules, 1898, rules 25, 33 (4), (5), and 50; Treasury Regulations relating to Medical Referees, regulations 1 (i.), (ii.), 4, 5, 6, and 20; and to *Davidson* v. *Summerlee and Moss End Iron and Steel Co.* (1); *Niddrie and Benhar Coal Co.* v. *M'Kay*. (2)

Asquith, K.C. (with him *Sankey*), for the workman in the second case.

Haldane, K.C., and *Ruegg, K.C.* (*A. Parsons* with them), for the employers in both cases. Clause 11 of the First Schedule to the Workmen's Compensation Act, 1897, may not be very artistically drawn, but it is submitted that the general scope of it is fairly intelligible. It applies to cases where, the workman being in receipt of compensation under the Act, the question may arise from time to time whether that compensation is to be continued. The object of the clause appears to be to provide in such cases, with regard to one limited issue, namely, as to the workman's physical condition from time to time, a mode of decision more convenient than an expensive inquiry, which might have to be repeated from time to time, upon possibly conflicting evidence of experts on either side. The clause provides in the first instance that the employer may, for the purpose of informing himself as to the condition of the workman, require him to submit himself for examination by a duly qualified medical practitioner provided and paid by the employer. If the workman does not wish to submit to examination by, or, having submitted, is dissatisfied by the certificate of, that practitioner, he may submit himself to examination by one of the medical referees appointed for the purposes of the Act under the Second Schedule, and the certificate of that referee is made conclusive evidence as to the workman's condition. It will be observed that, if the workman submits himself to examination by a medical referee, although the employer was not willing that he should do so, the certifi-

(1) (1903) 40 Sc. L. R. 764. (2) (1903) 40 Sc. L. R. 798.

cate of that referee will be conclusive in invitum as against the employer. There is no hardship, therefore, on the other hand, in requiring the workman to submit to examination by a medical referee, although his certificate will be conclusive if unfavourable to the workman's claim. It would appear that the medical referee would, by the terms of his appointment under the Act, be bound to make the examination, if applied to, without charge to the workman. The expenses of the medical referees are by clause 13 of the Second Schedule to the Workman's Compensation Act, 1897, payable by Parliament, and, if the Treasury Regulations have omitted to make provision for his fees in a case like this, it does not follow that any fee is payable by the workman. The words "such examination" at the end of clause 11 mean all such examination as is contemplated by the previous part of the clause. The workman has, if he prefers it, an option of submitting himself in the first instance to examination by a medical referee in substitution for that by a medical practitioner provided by the employer; or he may submit in the first instance to examination by that practitioner, and, if dissatisfied with his certificate, may appeal to a medical referee; but the clause makes it a condition of his right to claim further payments by way of compensation that he should submit to such examination as is thereby contemplated. By the ordinary rules of grammar the words "such examination" must refer to the lastly before-mentioned examination. The result of allowing the proceedings to go on would probably be that, upon the hearing by the county court judge, he would, on a conflict of expert evidence as to the workman's condition, order a reference to a medical referee on the subject under clause 13 of the Second Schedule. In that case the expense of a number of scientific witnesses would be thrown away, which would be avoided, if the employers' construction of the clause is correct.

S. T. Evans, K.C., and *Asquith, K.C.*, for the workmen, were not called on to reply.

COLLINS M.R. The point in this case lies within a very small compass. It arises in this way. A workman was

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injured by an accident, which arose out of and in the course of his employment, and by mutual arrangement compensation was for some time paid him by his employers. After a while the employers, having reason to think that the workman had recovered from the effects of the accident, required him to submit to an examination by a medical practitioner provided by them. He did so submit himself, and the medical practitioner certified that he had recovered. The employers gave him notice of that certificate, and of their intention to discontinue the weekly payments to him. He thereupon instituted proceedings for the purpose of having compensation assessed under the Workmen's Compensation Act, 1897. The employers then applied to the county court judge under clause 11 of the First Schedule, and rule 50, to stay all proceedings in the arbitration until the workman had submitted himself for examination by a medical referee in accordance with clause 11; and the county court judge granted the application. The question is whether, having regard to the terms of clause 11, it is a condition precedent to the right of the workman to claim that compensation should be assessed that he should have submitted to examination, not only by the medical practitioner provided by the employers, but also by a medical referee appointed under the Second Schedule of the Act.

This question appears to me to turn entirely on the true construction of clause 11. Before proceeding to read that clause, in order the better to appreciate its effect, I think it is desirable to read clause 3 of the First Schedule, which provides that, "where a workman has given notice of an accident, he shall, if so required by the employer, submit himself for examination by a duly qualified medical practitioner provided and paid by the employer, and, if he refuses to submit himself to such examination, or in any way obstructs the same, his right to compensation, and any proceeding under this Act in relation to compensation, shall be suspended until such examination takes place." Then by clause 11 it is provided that, "Any workman receiving weekly payments under this Act shall, if so required by the employer, or by any person by whom the employer is entitled under this Act to be

indemnified, from time to time submit himself for examination by a duly qualified medical practitioner provided and paid by the employer, or such other person." It will be observed that, whereas clause 3 contemplates a case in which no weekly payments by way of compensation have been made, either under an agreement or otherwise, clause 11 applies to a case where such payments are already being made, whether under an agreement or award. Up to that point in clause 11 it is clearly compulsory, and imposes on the workman an obligation to submit to examination by a medical practitioner provided by the employer, on pain of the consequences subsequently mentioned if he refuses to do so. But then comes a qualification of that obligation. The clause proceeds to provide that, "if the workman objects to an examination by that medical practitioner, or is dissatisfied by the certificate of such practitioner upon his condition, when communicated to him, he may submit himself for examination to one of the medical practitioners appointed for the purposes of this Act, as mentioned in the Second Schedule to this Act, and the certificate of that medical practitioner as to the condition of the workman at the time of the examination shall be given to the employer and workman, and shall be conclusive evidence of that condition." Then comes the provision which is the sanction of the enactment: "If the workman refuses to submit himself to such examination, or in any way obstructs the same, his right to such weekly payments shall be suspended until such examination has taken place."

It was contended for the employers in the first of these cases that the words "such examination" in the last part of clause 11 refer to the lastly before-mentioned examination, namely, the examination by a medical referee appointed under the Second Schedule, to which the workman may submit if dissatisfied with the certificate of the medical practitioner provided by the employer, and therefore, as the workman in this case had refused to submit to that examination, he came within the sanction of the clause, and his right to weekly payments was suspended. The county court judge adopted that view, and against his decision the workman has appealed.

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It appears to me that, when the clause is looked at as a whole, the contention for the workman clearly appears to be right, and I really feel no difficulty with regard to the matter. Who is the person to whom the sanction of the clause is addressed? It is a person who has refused to do something; which seems to me to involve that what he has refused to do was something which some one else had a right to require him to do. What was the examination to which the employers had a right under the clause to demand that the workman should submit himself? It was clearly only the examination referred to in the first part of the clause, namely, the examination at the instance of the employers by a medical practitioner provided by them. The examination contemplated by that part of the clause is the only examination which is made compulsory. An option is given to the workman by a subsequent part of the clause, if he does not wish to be examined by the medical practitioner provided by the employer, to substitute for examination by him an examination by a medical referee appointed under the Second Schedule to the Act; and it is further provided that, if the workman is dissatisfied by the certificate of the medical practitioner provided by the employer, he shall have an option to submit himself for examination to a medical referee; but, if he does so, the consequence will be that the decision of the medical referee will be conclusive, and binding on both parties. The clause gives him the option of taking this course subject to that consequence, but it does not make it compulsory upon him to do so. A workman who has submitted to examination by the medical practitioner provided by the employer, but has not exercised the option given by the later part of the clause, does not appear to me to come within the sanction, for he has not refused to submit to the only examination which is made compulsory by the clause. To hold that examination by a medical referee is the examination, refusal to submit to which would let in the penalty of suspension of the weekly payments, because, according to the grammatical rule of construction, the words "such examination" must be taken to refer to the last antecedent, would be, in my opinion, to give effect to a highly

technical rule, instead of to the obvious meaning of the clause. I think, reading clause 11 as a whole, it is not necessary, even in point of grammar, to read "such examination" as referring to the lastly before-mentioned examination. The rule relied on is after all only a guide to the construction of an enactment; and, if, on the language of the clause taken as a whole, it is clear that the words "such examination" refer to some examination to which the employer has a right to require the workman to submit, that rule becomes inapplicable.

Other parts of the Act, and many of the rules made under it, have been very properly referred to in the course of the argument, and do perhaps throw some additional light on the matter, but I do not think it necessary to go into them, because what I have already said, in my opinion, sufficiently deals with the substance of the case. The whole matter seems to me to have been already dealt with in a satisfactory manner by the dissentient judgment of Lord Young in *Davidson* v. *Summerlee and Moss End Iron and Steel Co.* (1), and the judgment of Lord M'Laren in *Niddrie and Benhar Coal Co.* v. *M'Kay.* (2) For these reasons I think that the appeal in the first of these cases must be allowed and that in the second dismissed.

MATHEW L.J. I am of the same opinion. I must say that I was somewhat surprised at the ingenuity that has enabled counsel for the employers to argue this case in the face of the reasoning of Lord Young in *Davidson* v. *Summerlee and Moss End Iron and Steel Co.* (1) and of Lord M'Laren in *Niddrie and Benhar Coal Co.* v. *M'Kay.* (2) It appears to me to be only necessary to read clause 11 in order to see what it means. It has been contended that it makes it a condition precedent to the right of the workman to claim further compensation that he should submit himself for examination by a medical referee appointed under the Second Schedule of the Act. On looking at the language of the clause, I can see nothing to support that contention. The first part of the clause requires the workman to submit to an examination by a medical

(1) 40 Sc. L. R. 764. (2) 40 Sc. L. R. 798.

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practitioner provided by the employer, and it is clear that he will be liable to a suspension of the weekly payments, under the subsequent part of the clause, if he refuses to do so. Then comes the provision which is said to create the supposed condition precedent. It provides that, "if the workman objects to an examination by that medical practitioner, or is dissatisfied by the certificate of such practitioner upon his condition when communicated to him, he 'may' submit himself for examination to one of the medical practitioners appointed for the purposes of this Act, as mentioned in the Second Schedule to this Act, and the certificate of that medical practitioner as to the condition of the workman at the time of the examination shall be given to the employer and the workman, and shall be conclusive evidence of that condition." Language more plainly importing an option, and not an obligation, it would be difficult to employ. But the meaning is made, if possible, still more clear by the contrast between the word "may" and the word "shall" used in the earlier part of the clause. Then the clause goes on to provide that, "if the workman refuses to submit himself to 'such examination' or in any way obstructs the same, his right to such weekly payments shall be suspended until such examination has taken place." What examination is there referred to? It was argued that the reference was to the examination by the medical referee. It is clear to my mind that the examination referred to is examination by the medical practitioner provided by the employer, for that is the only examination to which the workman is required by the clause to submit. The question appears to me to be entirely one of the construction of clause 11, and in my judgment that is quite clear.

COZENS-HARDY L.J. I agree, and only wish to add a very few words. In my opinion a workman cannot fairly be said to refuse to submit to an examination, as to which it is optional with him whether he will submit to it or not; and I think that, upon the terms of clause 11, there is nothing which gives any right to the employer to require a workman, who has submitted to an examination by the medical practitioner provided

by the employer, to submit himself, if dissatisfied with the certificate of that practitioner, to examination by a medical referee. The last sentence of the clause speaks of "such examination" in the singular, meaning thereby, I think, the examination by the medical practitioner provided by the employer, or, in substitution for him, by a medical referee, if the workman exercises the option given to him of substituting a medical referee for that practitioner. I entirely agree with the judgment of Lord Young on this subject in *Davidson* v. *Summerlee and Moss End Iron and Steel Co.* (1) and that of Lord M'Laren in *Niddrie and Benhar Coal Co.* v. *M'Kay.* (2)

Appeal in first case allowed and in second dismissed.

Solicitors for workman in first case: *Riddell & Co., for Walter Morgan, Bruce & Nicholas, Pontypridd.*

Solicitor for employers in first case: *H. P. Becher, for Simons & Powell, Pontypridd.*

Solicitors for workman in second case: *Metcalfe & Sharpe, for T. S. Edwards, Newport, Mon.*

Solicitor for employers in second case: *H. P. Becher, for Simons & Powell, Pontypridd.*

(1) 40 Sc. L. R. 764. (2) 40 Sc. L. R. 798.

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Dec. 12, 15.

[IN THE COURT OF APPEAL.]

GREEN *v.* BRITTEN & GILSON.

Employer and Workman—Compensation—Injury to Workman—Factory—Warehouse—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 2.

A place used in connection with, or as ancillary to, a wholesale business, for the storage of goods in large quantities to be sold in the business, is a warehouse within the meaning of s. 7, sub-s. 2, of the Workmen's Compensation Act, 1897.

Colvine v. *Anderson*, (1902) 5 F. 255, considered.

APPEAL from the decision of the judge of the Southwark County Court upon an application for compensation under the Workmen's Compensation Act, 1897. The applicant had sustained injury while engaged in moving heavy sheets of plate-glass, kept by the respondents in a railway arch, which formed part of their business premises.

The notes of the learned judge were prefaced by the following statement: "The case turned on whether the 'plate arch' in which the respondents stored and polished their heavy glass was a warehouse within the meaning of the Act. The respondents carried on a large business as drysalters and dealers in glass in a large shop in Union Street, Southwark. It was in the plate arch that the applicant was injured. The business of the firm is conducted in the shop; no more glass is stored there than is necessary for the current business. The glass is either supplied to the shop for customers giving their orders there, or when orders arrive from travellers the firm's carts fetch the glass direct from the plate arch. I held that the place in which goods are so kept for such a purpose is not a warehouse within the meaning of the Workmen's Compensation Act. In so finding I assumed to follow the principles laid down by the Courts."

From the evidence it appeared that the respondents carried on business as oil and colour merchants, drysalters, and glass-dealers, and that the applicant had been in their employment for

sixteen years, during the last five or six years of which he had been employed as warehouseman and occasionally as carman. The respondents' premises were in three parts. One part fronted Union Street, and was used for oil, colours, turpentine, and drysalters' goods; it was called by the witnesses the front shop; it was open to customers to come in and buy or order goods, and in it was the office for correspondence, &c. On the opposite side of a narrow street were some railway arches, two of which were occupied by the respondents; one was used as a lead and glazing shop, and was connected with the front shop by an underground way; the other, which was not so connected, was used for stacking cases and crates of glass, and was called the plate arch. On the day of the accident a foreman wanted a case from the back of this arch in order to load it for removal, and while the applicant was helping to shift some cases in order to get at it three of them fell on his leg, causing permanent injury to the knee. The arch was about 30 feet wide, 80 feet deep, and 15 feet high, and the cases stacked in it came from abroad and contained window-glass; there were sometimes as many as 400 or 500 cases in the arch. Customers did not go into the arch, and there was no buying or selling there. The front shop was open to any customers wishing to buy glass, and if the respondents had not there the glass required by or sold to customers, they sent to the arch for it. In the case of orders obtained by the respondents' travellers, the glass was sent to the customers direct from the arch.

It was contended on behalf of the respondents that the arch was not a warehouse within the meaning of s. 7, sub-s. 2, of the Workmen's Compensation Act, 1897, on the grounds, first, that it was used for the purpose of carrying on a business which was not that of warehousemen; and, secondly, that it was a workshop within the meaning of s. 149 of the Factory and Workshop Act, 1901, and was therefore not a warehouse. The finding of the county court judge was in the following terms: "I find that the 'plate arch' was used as ancillary to the business carried on in Union Street, and only so used, as a storehouse from which the wholesale and retail customers giving their orders either in the shop or by customers' orders

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to the travellers were supplied; goods being daily delivered there and also delivered out, and so not a warehouse within the meaning of the Act." He further found against the contention of the respondents that a workshop could not also be a warehouse. He therefore made an award in favour of the respondents.

The applicant appealed on the ground that the learned judge was wrong in law in holding that the place in which the accident happened was not a warehouse within the meaning of the Workmen's Compensation Act, 1897.

P. T. Blackwell (*Martin O'Connor* with him), for the applicant. The plate arch was a warehouse, and therefore a factory, within the meaning of s. 7, sub-s. 2, of the Workmen's Compensation Act, 1897. The reason given by the county court judge for holding it not to be a warehouse, namely, that it was ancillary to the business and only used as a storeroom, was in effect a misdirection upon a point of law. There is no definition of "warehouse" either in the Workmen's Compensation Act or in the Factory Act; it must, therefore, be construed in its ordinary and popular signification, as was done with the word "wharf" in *Haddock* v. *Humphrey*. (1) The definition of "warehouse" in Johnson's Dictionary is "a storehouse for merchandise," and in the Century Dictionary "a house in which wares or goods are kept; a storehouse"; also, "a store for the sale of goods at wholesale; also, often, a large retail establishment." This plate arch comes within those definitions.

[COLLINS M.R. If the arch were merely used for goods that were all cleared away in the course of the day, it would not be a storehouse.]

That would not be so strong a case, but it would be a question of evidence; here the goods are stored until sold in the shop in the ordinary course of business. The present case falls within the principle of the decision in *Willmott* v. *Paton* (2), where it was held that a yard or depot five acres in extent and having sheds upon it, which was used for storing old iron and

(1) [1900] 1 Q. B. 609. (2) [1902] 1 K. B. 237.

breaking it up for sale, was a "warehouse" within the meaning of the Act. The decision in *Burr* v. *Whiteley* (1) is distinguishable; for in that case the part of the premises which it was sought to bring within the term "warehouse" was only used for storage of goods which were subsequently sold in the adjacent retail shop. The result of the authorities is that the question is a mixed question of law and fact, and the county court judge has misdirected himself in holding that this arch cannot in law be a warehouse. [He also cited *Maude* v. *Brook* (2); *Hoddinott* v. *Newton, Chambers & Co.* (3)]

Shakespeare, for the respondents. The county court judge was right in holding that this arch was not a warehouse. The business was in substance a business carried on in the shop, and it is immaterial that many of the orders were obtained through travellers, and that the goods were supplied from the store in the arch in execution of the orders given. The Act contemplates that, in order that a building may be a warehouse, warehousing must be the main business carried on. It is true that the Act contains no definition of "warehouse"; but it is apparent from s. 4 that that which is merely ancillary to the real trade or business of the undertakers is not within the Act; the criterion must be the nature of the business of the employer.

[COLLINS M.R. You draw a distinction between a man who merely stores his own goods and one who stores goods for hire.]

Yes. If the word "warehouse" is to be interpreted in its widest sense, it will bring every shop within the Act, for every shopkeeper must store goods for use in the business carried on there; and this arch is merely a storeroom for storing goods for the purpose of the business carried on in the shop. The case is indistinguishable from *Burr* v. *Whiteley*. (1) [He also cited *Colvine* v. *Anderson* (4) and *Hunt* v. *Grantham Co-operative Society*. (5)]

Blackwell, in reply.

Cur. adv. vult.

(1) (1902) 19 Times L. R. 117.
(2) [1900] 1 Q. B. 575.
(3) [1901] A. C. 49.
(4) 5 F. 255.
(5) (1902) 112 L. T. Journ. 364.

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1903. Dec. 15. COLLINS M.R. I am of opinion that this appeal must be allowed. The question for our determination arises in this way. The applicant met with an accident in what I may for the moment call a warehouse, the point in dispute being whether for the purposes of the Workmen's Compensation Act the place was a warehouse or not; it is difficult to describe it by a neutral term. The accident happened while he was unloading some heavy cases of glass, three of which fell on him and injured his leg. There were two railway arches in the occupation of the respondents, one of which was used for the storage of heavy glass goods, the other for lighter articles and various purposes. The respondents also occupied an office and shop in Union Street, and the arch in question, which I have called a warehouse, was used primarily for storing heavy glass goods in connection with the wholesale and retail business carried on in the shop. It seems that orders were sent by the respondents' travellers to the office or were given by customers in the shop, and the goods were supplied direct from this store or warehouse; as far as the wholesale trade was concerned, this arch fulfilled all the ordinary purposes of a warehouse, while the retail trade seems to have formed but an insignificant part of the business. The county court judge held that the arch was not a warehouse within the meaning of s. 7 of the Workmen's Compensation Act; and the question whether his decision was right is not an easy one to determine.

It is exceedingly difficult, having regard to the various decisions, to draw the line between what is a warehouse and what is not. The decisions of this Court have gone a long way, and have excluded certain lines of definition. It cannot now be contended that the word "warehouse" is limited to a place which is physically connected with a dock or with water, nor to a place where the public have a right to have their goods stored upon payment of rent; the word has been applied to places used by a particular owner for the storage of his own goods only and having no connection with water or with water transit. In a recent case we adopted the distinction drawn by his Honour Judge Wightman Wood in *Hunt* v. *Grantham*

Co-operative Society (1), who distinguished places where goods were kept for the purposes of a retail business carried on in a shop from a warehouse, and held that where the store was merely ancillary to the business carried on in a retail shop it was not a warehouse within s. 7, as neither shops nor shopkeepers are within the Act. This principle we followed in *Burr* v. *Whiteley* (2), where we held that a large receptacle used for the storage of goods intended for sale in a very large retail shop was not a warehouse within the meaning of the Workmen's Compensation Act.

In the present case the business of the respondents savours both of a wholesale and of a retail nature, for while a wholesale business is carried on, there is a certain amount of retail business carried on in the shop, and goods are kept in this arch for sale by retail. In the main, however, looking at all the facts, the arch was substantially used for the storage of goods for the purposes of the wholesale trade. This being so, the learned judge misdirected himself to this extent: he assumed that the store was merely ancillary to the business carried on in the shop, and was therefore not a warehouse within the principle of the decisions. But that result does not necessarily follow, for one must look at the nature of the business carried on by the respondents, and if it is substantially a wholesale business the place where the goods are stored may be, and I incline to think as a matter of law must be, a warehouse within the meaning of the Act. It is suggested that there is a difficulty in holding that a store which is ancillary to a retail business is not, and that one which is ancillary to a wholesale business is, a warehouse; but the two are obviously very different; and in my judgment, if this arch is ancillary to the wholesale business, it is a warehouse; if it is ancillary to the retail business, it is not. I think, therefore, that in deciding a mixed question of fact and law, the county court judge misdirected himself in point of law. The facts present no difficulty, and it seems to me that substantially this was a wholesale business, and the goods were stored in the arch for

(1) 112 L. T. Journ. 364.

(2) 19 Times L. R. 117.

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the purposes of that business. The reason which actuated the Legislature in introducing the word "warehouse" into the Act was no doubt the danger incident to the handling of goods on a large scale, as in a wholesale business, and that danger is as likely to be present whether the goods are handled in a place which is ancillary to the place in which the sale of the goods by wholesale actually takes place, or whether they are handled solely at the place of sale.

Reference has been made to the Scottish case of *Colvine* v. *Anderson* (1), which is said to be an authority against the view which I have taken; but I cannot see that the two cases are inconsistent with each other. I adopt the language of the Lord President when he says (2): "Upon these facts, I am of opinion that the respondents' premises are not a 'warehouse' within the meaning of the Workmen's Compensation Act, 1897. There is no definition of 'warehouse' in the Act of 1897, and we know that the term is used in a variety of senses; but I think that, as used in that Act, it does not include a retail shop, which the respondents' premises practically are, otherwise every such shop would come under the provisions of the Factory Acts, which have not hitherto, so far as I am aware, been held applicable to them. While it may be difficult to define 'warehouse,' I am of opinion that, as used in the Act of 1897, it involves the idea of a place normally of considerable size, mainly used for the storage of goods in bulk or in large quantities, and in which consequently the dangers incident to the handling of goods in bulk or in large quantities might naturally arise." That passage expresses as accurately as possible, in my judgment, the meaning of the word "warehouse" as used in this Act, and all the conditions suggested by the Lord President are fulfilled in the present case. I think that the county court judge was too strict in his direction to himself as to the limits within which he ought to find that this store was ancillary to the retail trade; on the true facts, I am clearly of opinion that the arch was used for a purpose ancillary to the wholesale business,

(1) 5 F. 255. (2) 5 F. at p. 259.

and was, therefore, a warehouse within the meaning of s. 7 of the Act.

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MATHEW L.J. I am of the same opinion. We have a careful statement by the county court judge of the grounds of his decision; but upon the evidence I think the store was used for purposes which make it in law a warehouse within the meaning of the Workmen's Compensation Act. It appears, both from the evidence and the findings of the judge, that the glass was in the first instance brought from abroad to this arch for the purpose of being polished, and when polished was there stored in large quantities and in heavy packages until required for delivery to customers on being sold by orders given to the respondents' travellers or by customers in the shop. The conclusion of the county court judge was that a retail business was carried on at the shop, and that the store was ancillary to the business of that shop because it was partly used for the storage of goods which were afterwards transferred to the shop for the purpose of delivery—in other words, he treated the store as a shop, a conclusion at which he arrived by the use of the word "ancillary." No doubt there are many cases to which that word can properly be applied, as where the store is subsidiary, subordinate, or appurtenant to the business carried on in the shop; but it is not applicable in the present case, for this store was not merely subsidiary, but was indispensable to the carrying on of the business. We are, therefore, relieved from the difficulty which the county court judge created for himself by the use of the word "ancillary." I think that his mistake was in treating the store, because it was used in connection with the shop, as being nothing more than a shop, and therefore not a warehouse. Our decision is in entire accordance with *Colvine* v. *Anderson* (1); this arch was used, not as a shop, but in connection with the wholesale business as a store where goods were kept and delivered out as required for conveyance to purchasers; it is therefore a warehouse, and this appeal must be allowed.

(1) 5 F. 255.

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COZENS-HARDY L.J. I have felt during the argument, and still feel, some doubt; but I am not prepared to dissent from the view of my Lord and Mathew L.J.

Appeal allowed.

Solicitor for applicant: *W. B. Blackwell.*
Solicitors for respondents: *W. Hurd & Son.*

W. J. B.

C. A. 1903 *Dec.* 19.

[IN THE COURT OF APPEAL.]

RIGBY & CO. *v.* COX.

Employer and Workman—Workmen's Compensation—Appeal—Refusal to direct Review of Taxation of Costs—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *Sched. I., clause* 12; *Sched. II., clause* 4.

An appeal will not lie to the Court of Appeal under clause 4 of the Second Schedule to the Workmen's Compensation Act, 1897, against the refusal of a county court judge to direct a review of taxation of costs of an application under clause 12 of the First Schedule to review a weekly payment.

APPEAL from a decision of the judge of the Bromley County Court refusing to direct a review of the taxation of the costs of an application for review of a weekly payment under the Workmen's Compensation Act, 1897.

Cox, a workman in the employment of Rigby & Co., having sustained injury by an accident arising out of and in the course of his employment, the amount of weekly compensation to be paid to him was ascertained by agreement between himself and his employers, and a memorandum of the agreement was sent to the registrar of the county court, as prescribed by Sched. II., clause 8, of the Workmen's Compensation Act, 1897, and was duly registered by him. Some months afterwards the employers applied to the county court judge under Sched. I., clause 12, of the Act for a review of the weekly payment on the ground that the workman was fit to go to work; this application was dismissed with costs upon Scale B of the county court scales of costs, and in due course the costs of the workman were carried in for taxation. Upon taxation

it appeared that the county court judge had made a general rule or order, which applied to all his courts, that the costs of an application under Sched. I., clause 12, to review a weekly payment were to be taxed as costs of an interlocutory application, and not as costs in the original arbitration; the registrar, therefore, taxed the costs as upon an interlocutory application, the effect of which was very materially to diminish the amount of the taxed costs. An application was then made by the workman to the county court judge for a review of the taxation, but was dismissed by the judge, who stated that he had laid down a general rule that the costs of an application to vary a weekly payment, whether under an award or under an agreement registered in accordance with Sched. II., clause 8, were to be taxed as costs of an interlocutory proceeding in the course of the arbitration. The workman appealed.

Duckworth, for the employers. There is a preliminary objection to the hearing of this appeal. The appeal, if any, from the decision of the county court judge does not lie to the Court of Appeal. The case does not come within Sched. II., clause 4, of the Act, upon which clause the right of appeal to the Court of Appeal depends. That clause limits the right of appeal to questions of law arising in the arbitration; but the arbitration is finished when the award is once made, and the powers of the county court judge as an arbitrator then come to an end; all proceedings subsequent to the award are taken before him in his capacity of county court judge and not as an arbitrator, and appeals from his decisions in such proceedings can only lie (if at all) under the County Courts Act, 1888, and are subject to the County Court Rules. [He cited *Keane* v. *Nash* (1); *Leech* v. *Life and Health Association*. (2)]

Harold Morris (*Chester Jones* with him), for the workman. An appeal lies to the Court of Appeal. The application to review the weekly payment was an arbitration under the Act, and the costs were costs of the arbitration. There is no good reason for the suggestion that the application to direct a review of the taxation was not part of the arbitration, but was in the

(1) (1903) 88 L. T. 790. (2) [1901] 1 K. B. 707.

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nature of a proceeding under the ordinary jurisdiction of the county court. *Keane* v. *Nash* (1) is not an authority, for in that case there was an unsuccessful action under the Employers' Liability Act, followed by an assessment of compensation under s. 1, sub-s. 4, of the Workmen's Compensation Act, and it was the taxation of the costs of the original action which it was there sought to review; here it is only the costs of an arbitration under the latter Act that are in question.

Duckworth, in reply.

COLLINS M.R. I think that the preliminary objection that has been taken to our hearing this appeal is a sound one. It appears that an agreement had been come to as to the amount of compensation to be paid by the employers to the workman, and a memorandum duly registered under the Act. Subsequently the employers applied to vary the amount of compensation, and the judge, sitting as an arbitrator under the Workmen's Compensation Act, made his award in favour of the workman that the amount of the weekly payments should not be varied, and directed that the costs of the application should be taxed on Scale B. The costs were carried in before the registrar for taxation, and taxed as upon an interlocutory application, in accordance with a general direction of the judge that the costs of all applications to review weekly payments under the Act were to be taxed on the same footing as the costs of interlocutory applications; the matter then came before the judge on an application to compel the registrar to review his taxation, and upon the judge declining to interfere this appeal was brought. The objection is now taken that no appeal from his decision lies to the Court of Appeal, but that it lies, if there is an appeal at all, to the Divisional Court. In my opinion the case is covered by the authority of *Keane* v. *Nash* (1), and no appeal lies to this Court. That decision would apply equally if the judge had reviewed the taxation and had ordered an alteration to be made, and one of the parties had objected to it. If there is any appeal at all in the

(1) 88 L. T. 790.

present case (as to which I express no opinion), it does not lie here, but to the Divisional Court.

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MATHEW L.J. I have come with considerable reluctance to the same conclusion, for there certainly is an apparent contradiction between an award of costs to the plaintiff under Scale B., and a taxation of his costs upon a basis which does not give him the full benefit of that scale. In a particular case it may well be that no complaint could properly be brought against a direction to tax the costs as those of an interlocutory proceeding; but in my opinion such a general rule as that of which we have heard in the present case most certainly ought not to be laid down by a county court judge.

COZENS-HARDY L.J. I agree both in the result and in my brother Mathew's view as to what I may style the impropriety of laying down a general rule which has the effect of varying the awards made by the county court judge himself upon applications to review under the Act of 1897.

Appeal dismissed.

Solicitors for employers: *William Hurd & Son.*

Solicitors for workman: *Shaen, Roscoe & Co., for Morgan & Co., Newport, Mon.*

W. J. B.

Applied. WRIGHT *v.* DEAN. [1948] Ch. 686

C. A.

1903

Oct. 29;
Dec. 14.

[IN THE COURT OF APPEAL.]

STUART AND OTHERS *v.* JOY AND ANOTHER.

*Lease—Covenants—Assignment of Reversion—Liability of Assignor on express Covenants in Lease—*32 *Hen.* 8, *c.* 34, *ss.* 1, 2.

A lessor who has assigned his reversion remains liable upon his express covenants, running with the reversion, in a lease for years under seal.

APPEAL by the defendants from the decision of Wright J. giving judgment for the plaintiffs in an action tried without a jury.

The claim of the plaintiffs, Stuart & Gregson and the British Oil and Cake Mills, Limited, was for damages alleged to have been sustained by reason of the failure by the defendants to perform an award.

The following statement of the material facts proved or admitted at the trial is taken from the judgment of Lord Alverstone C.J. (1) :—

The action was founded upon an award whereby the arbitrators, acting under an arbitration clause in a lease or leases previously granted by the defendants Joy and Nantes to the plaintiffs Stuart & Gregson, had decided that the defendants should renew certain pairs of millstones. Prior to February 15, 1898, the plaintiffs Stuart & Gregson had occupied, under leases, an oil mill of which the defendants were the lessors. There had been several leasehold terms in succession, but in the year 1898, and prior to the month of February, the plaintiffs Stuart & Gregson and the defendants had referred the questions which had arisen at the expiration of the then existing term to arbitrators. The award was made on February 17, 1898. Before the award was made the parties negotiated for a new lease, which was granted on February 15, 1898, by the defendants as lessors to the plaintiffs Stuart & Gregson as lessees. The lease contained the usual covenants and an arbitration clause as to disputes or differences arising

(1) Post, p. 365.

between the lessors and lessees. It then recited that the premises had recently been occupied by the lessees under expired leases, the reference to arbitration, that the award had not been made, and contained the following covenant: "Now therefore this indenture lastly witnesseth that the lessors do hereby jointly and severally covenant with the lessees and the lessees do hereby jointly and severally covenant with the lessors in manner following (that is to say) that when and so soon as the award of the said" (arbitrators) "in pursuance of the said reference shall be made in writing ready to be delivered to the lessors and the lessees they the lessors will on or before the first day of August 1898 and at a time or times convenient to the lessees duly complete and execute all the repairs matters and things therein stated to be within the province of the lessors." The award having been made, the plaintiffs Stuart & Gregson, in the month of November, 1899, assigned their interest in the premises to the plaintiffs, the British Oil and Cake Mills, Limited, and in the year 1901 the stones referred to in the award having given way, the defendants were called upon to perform their duty as awarded. They declined to do so, whereupon the plaintiffs the British Oil and Cake Mills, Limited, put the stones in repair at an expense which was agreed between the parties as 165*l.*, for which sum judgment was given for the plaintiffs. The defendants, in May, 1901, conveyed by deed all their estate and interest in the premises in question to the North Eastern Railway Company.

Montague Lush, K.C., and *Henn Collins*, for the appellants. The British Oil and Cake Mills, Limited, not being parties to the arbitration, are not entitled to sue upon the award. If they could have had any rights under the award, those rights were determined by the express covenant contained in the lease of February 15, 1898. That covenant operated as an accord and satisfaction in respect of the defendants' liability under the award. The plaintiffs cannot sue upon any covenant contained in the lease unless and until they have gone to arbitration under the arbitration clause.

Further, the defendants, having assigned their reversion,

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are not liable upon the covenant. It is not a collateral covenant, but one which touches and concerns the demised premises, and it therefore runs with the reversion. At common law no covenant ran with the reversion. The effect of the statute 32 Hen. 8, c. 34, was to give to the assignee of the reversion the same rights against the lessee as the lessor had, and to take away the lessor's rights. Next, the lessee is given the same rights against the assignee of the reversion as he had against the lessor. There is a distinction between the lessee and his assignee and the lessor and his assignee; the lessee, after assignment, remains liable upon his express covenants, but the lessor, after assignment, does not. The Act transfers to the assignee of the reversion the privity of contract which existed between the assignor and the lessee: 1 Smith's Leading Cases, 11th ed. p. 74, notes to *Spencer's Case*; *Thursby* v. *Plant* (1); *Beely* v. *Parry* (2); *Midgley and Gilbert* v. *Lovelace* (3); *Bickford* v. *Parson and Another* (4), judgment of Wilde C.J.; *Conran* v. *Pedder* (5); Bac. Abridg. tit. "Covenant," E. 6. In *Conran* v. *Pedder* (5) and in *Green* v. *James* (6) it was assumed that the lessor, after assignment, could not sue the original lessee for rent. The opinion expressed by Lord Macnaghten in *Eccles* v. *Mills* (7), that the estate of a deceased lessor who had assigned his reversion remained liable after the assignment on a covenant which ran with the reversion, was not necessary for the decision of that case, and is in conflict with *Conran* v. *Pedder*. (5) Sects. 10 and 11 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), do not affect the question.

Scott Fox, K.C., and *A. J. Ashton*, for the respondents. This action was upon the award. An action will lie for the non-performance of an award directing certain things to be done where the parties have agreed to perform the award: *Lievesley* v. *Gilmore*. (8) The award can be enforced apart from the

(1) (1669) 1 Wm. Saund. 241.
(2) (1684) 3 Lev. 154.
(3) (1694) Carth. 289.
(4) (1848) 5 C. B. 920, at pp. 929, 930.
(5) (1852) 2 Ir. C. L. 200.
(6) (1840) 6 M. & W. 656; 55 R. R. 753.
(7) [1898] A. C. 360, at p. 371.
(8) (1866) L. R. 1 C. P. 570.

covenant contained in the lease of February 15, 1898. The obligation to perform the award was not merged in or destroyed by the covenant. The doctrine with respect to merger, which is stated in *Filmer* v. *Burnby* (1) and *Price* v. *Moulton* (2), applies only to debts. It cannot have been the intention of the parties here that there should be a second arbitration in order to obtain performance of the award.

On the question of the assignment of the reversion, a lessor who has assigned his reversion remains liable upon his express covenants entered into with the lessee. The privity of contract between them is not destroyed by the assignment. That view of the operation of the statute of Hen. 8 is clearly expressed by Lord Macnaghten in *Eccles* v. *Mills* (3); see also *Auriol* v. *Mills* (4), Lord Kenyon C.J. The statements in *Thursby* v. *Plant* (5) and in the other authorities cited, that the statute has "transferred the privity of contract" from the lessor to the assignee of the reversion, do not mean that the statute has extinguished privity of contract between the lessor and lessee.

Henn Collins replied.

Cur. adv. vult.

Dec. 14. The following judgments of the Court (Earl of Halsbury L.C., Lord Alverstone C.J., and Cozens-Hardy L.J.) were read :—

LORD ALVERSTONE C.J. This was an appeal from Wright J., who decided in favour of the plaintiffs in an action brought by Messrs. Stuart & Gregson as lessees, and the British Oil and Cake Mills, Limited, as assignees, of a lease granted by the defendants Joy and Nantes. [His Lordship stated the facts previously set out.] Wright J. decided in favour of the plaintiffs on the ground that the action was brought upon the award, and that the defendants, having failed to carry out the award, were liable to the plaintiffs for the amount expended. I am

(1) (1841) 2 M. & G. 529.
(2) (1851) 10 C. B. 561, at pp. 572, 573.
(3) [1898] A. C. 360, at p. 371.
(4) (1790) 4 T. R. 94, at p. 98; 2 R. R. 341.
(5) 1 Wm. Saund. 241.

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Lord Alverstone C.J.

of opinion that the judgment is right, but if I were to state in my own way the reasons for my judgment I would say that both under the award and under the lease whereby the defendants covenanted to perform the award they, the defendants, were liable to carry out the award; that not having done so an action would lie by the plaintiffs Stuart & Gregson to enforce the performance of the award; and that the plaintiffs, the British Oil and Cake Mills, Limited, who are now beneficially entitled to the lease and have spent the amount which was necessary to carry out the award—the obligation to perform which was upon the defendants—are entitled to recover from the defendants, either in their own name or at any rate in an action to which both they and Messrs. Stuart & Gregson are parties, the amount so paid. In answer to this view a number of points were raised by Mr. Lush and Mr. Henn Collins on behalf of the defendants with which I will briefly deal. It was first said that the British Oil and Cake Mills, Limited, have no rights under the award; and, even if they had, those rights were gone because the covenant contained in the lease of February 15, 1898, to complete and execute the award took the place of the liability upon the award, and the remedy by the plaintiffs Stuart & Gregson, if any, is upon the covenant. I am of opinion that this point is not sound. The covenant was not in substitution of the liability upon the award, but a recognition of its binding effect, and may well have been thought necessary in order to keep alive the rights of Stuart & Gregson notwithstanding that they had taken a new lease of the premises. But, whether the remedy be upon the covenant or upon the award, for the reasons which I have already stated it makes no difference. It was then urged that before the covenant could be enforced there must be a reference to arbitration under the arbitration clause in the earlier part of the lease. An examination of the terms of the lease affords the answer to this argument. The lease contained mutual covenants to operate during the term, with the arbitration clause applicable to them. It then went on by express covenant to recognise and continue an obligation of the defendants to obey the award.

To say that a second arbitration was necessary before effect could be given to that covenant, or the obligation thereby recognised, seems to me to be a plain contradiction of the express provisions of the deed. Lastly, it was urged that inasmuch as the covenant took the place of the award, and the reversion had been assigned by the defendants to the North Eastern Railway Company, the defendants were discharged from the obligation imposed upon them by the covenant, and in consequence by the award. For the reasons I have already given this point does not become material, but I think it right to say that, so far as I personally am concerned, I am satisfied that any such view is inconsistent with the judgment of the Privy Council in the case of *Eccles* v. *Mills*. (1) For the above reasons I am of opinion that the judgment for the plaintiffs should stand and the appeal be dismissed with costs.

COZENS-HARDY L.J. I have had the opportunity of reading the judgment of the Lord Chief Justice, with which I entirely agree, and I do not wish to add anything except upon one point—namely, the liability of the defendants under the express covenant in the lease. It was strenuously argued, particularly by Mr. Henn Collins, that no liability can now be enforced against the lessors, inasmuch as they have assigned the reversion, the effect of which was to shift the obligation from the lessors to the assignees. I assume, in favour of the appellants, that the covenant to execute repairs on the demised premises in obedience to the award to be made was a covenant running with the reversion to which the statute 32 Hen. 8, c. 34, applies. If so, s. 2 gives the lessees a right of action against the assignees of the reversion for breach of the covenant. But it is difficult to see why that enactment should release the lessors from their express covenant. There is nothing in the language of the section to lead to this conclusion. It is true that in *Thursby* v. *Plant* (2) it is said that the statute has transferred "the privity of contract" from the lessor to the assignee of the reversion, but that does not mean anything more than that the assignee of the reversion is made liable by the statute in

(1) [1898] A. C. 360. (2) 1 Wm. Saund. 241.

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the same manner as at common law the assignee of the lessee was liable. In every case the express covenants entered into by the lessor with the lessee, or by the lessee with the lessor, remain unaffected. The consequence of holding that a landlord can escape from all liability upon his express covenants in the lease by assigning to a pauper would be alarming. In my opinion, the position of the lessor with respect to covenants running with the reversion is now precisely similar to the position of the lessee with respect to covenants running with the lease. In neither case is liability extinguished by assignment. No authority contrary to this view has been called to our attention, but the very point was raised before the Privy Council in *Eccles* v. *Mills*. (1) That case was ultimately decided on the ground that the covenant in question by the testator, who was the lessor, did not run with the reversion; but the arguments and the judgment dealt with the case also on the alternative view, which had been adopted in the Court below, that the covenant did run with the reversion; and Lord Macnaghten says (2): "Whatever liability the statute threw on the specific devisees as assignees of the reversion, that they were bound to bear as between themselves and the lessee. But the testator's estate was also liable." This dictum, though not necessary for the decision of the case, strongly supports the view which, apart from authority, I have expressed. For these reasons I think that the lessees and the assignees of the lease, as co-plaintiffs, can maintain the present action against the lessors for breach of the covenant to obey the award.

LORD ALVERSTONE C.J. I am desired by the Lord Chancellor to say that he entirely concurs with both these judgments, and does not desire to add anything.

Appeal dismissed.

Solicitors for appellants: *Chester & Co., for Holden, Sons & Hodgson, Hull.*

Solicitors for respondents: *Collyer-Bristow & Co., for W. J. Stuart, Hull.*

(1) [1898] A. C. 360. (2) [1898] A. C. at p. 371.

W. A.

COMMISSIONER OF POLICE *v.* ROBERTS.

1903
Dec. 11.

Licensing Acts—Offences—Keeping open during Prohibited Hours—Licensing Act, 1874 (37 & 38 *Vict. c.* 49), *s.* 9.

In order to constitute the offence of keeping open licensed premises for the sale of intoxicating liquor during prohibited hours, within the meaning of s. 9 of the Licensing Act, 1874, there must be a keeping open of the premises in the sense that people can get in from the outside to procure intoxicating liquor, or can get it supplied to them when outside.

CASE stated by justices for the county of Essex.

An information and complaint had been laid by the appellant against the respondent under s. 9 of the Licensing Act, 1874, charging him with having on April 17, 1903, unlawfully kept open his licensed premises for the sale of intoxicating liquors during the time in which they were directed to be closed by and in pursuance of that Act. At the hearing the following facts were proved or admitted.

The respondent, who was the licensee of the Three Rabbits public-house, applied for, and was granted, an occasional licence pursuant to s. 29 of the Licensing Act, 1872, exempting him from the provisions of that Act relating to the closing of premises during certain hours, the occasion being a Masonic festival held at his licensed premises. The ordinary time for closing under the provisions of the Licensing Acts was from 11 P.M. on April 16 to 6 A.M. on April 17; the exemption under the occasional licence extended the time during which the respondent was entitled to keep open his premises for the sale of intoxicating liquors from 11 P.M. on April 16 to 12.30 A.M. on April 17.

At 12.30 A.M. on April 17 Edward Jones, a police sergeant, was on duty outside the premises, the outer doors of the house being then closed. Jones drew the attention of the respondent's manager to the time. Singing was going on inside the premises and continued till 12.38 A.M., at which time the respondent came out and said to Jones, "I am very sorry they have stopped so late." Jones answered, "I shall report

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the matter;" to which the respondent replied, "Do as you like—you have your duty to do. I thought the licence was till 1 A.M., instead of 12.30." Between 12.30 and 12.45 thirty-eight persons came out of the private door of the premises. The doors of the premises were closed at 12.30 A.M., and there was no evidence that any persons were admitted or served with intoxicating liquors after 12.30 A.M. The respondent was not called to give evidence, nor was any evidence given on his behalf. It was contended that there was no evidence upon which the respondent could be convicted, and *Jeffrey* v. *Weaver* (1) was cited in support of the contention.

Upon the above facts, and in view of the statement of the respondent that he thought the extension of his licence was until 1 A.M., the justices were of opinion that the closing of the doors of the house at 12.30 A.M. was not with the intention of ceasing to supply intoxicating liquors to the persons already in the house. They therefore found as a fact that in substance the house was kept open until after 12.30 A.M. for the sale of intoxicating liquors in the sense that it was intended by the respondent that intoxicating liquor should be sold to the persons already therein; but in view of the fact that the doors were physically closed and that no persons in fact entered after 12.30 A.M., and that there was no evidence that any persons were served with intoxicating liquor after 12.30 A.M., they deemed themselves bound by *Jeffrey* v. *Weaver* (1), and dismissed the information.

The question for the Court was whether upon the above facts and finding the justices came to a correct determination in point of law.

Danckwerts, K.C. (*Arthur Gill* with him), for the appellant. The justices were wrong in holding that, as the outer door was shut, they were bound by the decision in *Jeffrey* v. *Weaver* (1) to dismiss the information. The mere physical closing of the outer door is not the proper test to apply when considering whether a licensed house is kept open during prohibited hours, although the language of Grantham J. in that case may at

(1) [1899] 2 Q. B. 449.

first sight appear to support that view. Sect. 9 of the Licensing Act, 1874, deals with three classes of offence which may be committed during prohibited hours: (1.) selling or exposing for sale in the premises; (2.) opening or keeping open the premises for sale; and (3.) allowing intoxicating liquors to be consumed in the premises although purchased before closing time. "Keeping open" for sale does not depend upon whether there is a physically closed door, but upon whether the landlord is in a position to supply intoxicating liquor on the premises during prohibited hours. The "premises" mentioned in s. 9 include all the premises comprised in the licence, and it is therefore sufficient if access can be obtained in any way, and not merely by the door which is ordinarily used as the approach to the bar. *Tassell* v. *Ovenden* (1) shews that the opening of the front door is immaterial; in that case the occupier of a draper's shop had an off-licence for the sale of wine and spirits; the outer door was open after prohibited hours, but it was held that, as the intoxicating liquors were locked up in a special case, the premises must, as regarded the sale of intoxicating liquors, be taken to have been closed at the proper hour. In *Finch* v. *Blundell* (2) the outer door was shut, and no one was seen to come out; but it was held that the fact that two men were found inside with a jug of fresh beer was evidence of keeping open for sale. The decision in *Tennant* v. *Cumberland* (3) has been misunderstood; it really decided only that the evidence was insufficient to warrant the inference that the premises were kept open for sale, when the outer door had been closed at the proper time. The closing must be a real and not a sham one: per Mellor J. in *Brigden* v. *Heighes*. (4) *Jeffrey* v. *Weaver* (5) is not an authority against the appellant. *Lloyd* v. *Barnett* (6) shews that it is immaterial if the door is open after closing time, provided that no one enters the premises and no drink is drawn. In the present case it is found that the closing of the door was not with the intention of ceasing to supply intoxicating liquor. The words "keep

(1) (1877) 2 Q. B. D. 383.
(2) (1862) 26 J. P. 71.
(3) (1859) 1 E. & E. 401.
(4) (1876) 1 Q. B. D. 330.
(5) [1899] 2 Q. B. 449.
(6) (1900) 64 J. P. 708.

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open" should be construed in a reasonable, and not in a strict, sense, having regard to the difficulty in such a case of proving an actual sale during prohibited hours. [He also cited *Jefferson* v. *Richardson*. (1)]

R. D. Muir, for the respondent, was not called upon to argue.

LORD ALVERSTONE C.J. I think that this case is too plain, having regard to the authorities, for us to place the meaning upon the section which we are asked to place upon it by the appellant. The respondent was summoned under s. 9 of the Licensing Act, 1874, for unlawfully keeping open his licensed premises for the sale of intoxicating liquors during the time in which they were directed by that Act to be closed. That section specifies three offences which may be committed during prohibited hours: the first is selling or exposing for sale in the premises, and I do not desire to conjecture what might have been the result had the charge in the present case been framed under that portion of the section; secondly, comes the offence of opening or keeping open the premises for the sale of intoxicating liquors, under which the present charge is framed; and, thirdly, allowing intoxicating liquors, although purchased before the hours of closing, to be consumed in the premises, as to the effect of which last enactment upon the facts in the present case I desire to express no opinion.

The only way in which the present case differs from the previous case of *Jeffrey* v. *Weaver* (2) is that because the respondent made the mistake of thinking that the closing hour was one o'clock instead of half-past twelve, the justices thought that he would have supplied liquor to the people in the house if he had been asked to do so; and it is contended that that finding, or expression of opinion, is sufficient to make it compulsory on the justices to find that he was keeping the premises open for the sale of intoxicating liquor. There is a series of decisions, of which *Jeffrey* v. *Weaver* (2) is only one, the effect of which is that in order to constitute an offence under the second branch of s. 9 there must be a keeping open of the

(1) (1871) 35 J. P. 470.

(2) [1899] 2 Q. B. 449.

premises in the sense that people can get in from the outside to have intoxicating liquor, or that they can get it supplied to them when outside. It was not intended by the Legislature to let a prosecution under that branch of the section take the place of one under one of the other branches merely because it may be thought that the licensed person would have supplied liquor if he had been asked for it.

LAWRANCE J. I am entirely of the same opinion. The justices have not found that any offence was committed, and the facts found are quite insufficient to justify us in arriving at a different conclusion.

KENNEDY J. I am of the same opinion. Having regard to the various offences dealt with by the section, I think that to construe the expression "opens or keeps open such premises for the sale of intoxicating liquors" in any sense but the natural one would be to interfere with the plain intention of the Legislature in creating three distinct offences. In my opinion all the decisions are in accord with giving its ordinary meaning to the language employed, and the meaning of this branch of the section cannot be extended beyond the affording an opportunity to a customer to enter the premises, or affording an opportunity for liquor to pass out to him. There may sometimes be a difficulty in proving an offence under the other clauses of s. 9, but that is a very inadequate reason for construing this clause in a non-natural way.

Appeal dismissed.

Solicitors for appellant: *Wontner & Sons.*
Solicitor for respondent: *F. A. S. Stern.*

W. J. B.

1903
Nov. 16;
Dec. 21.

JENKINS, Appellant; GROCOTT, Respondent.

Parliament—Franchise—Qualification—Lodger—Claim—Objection—Evidence—Rateable Value—Parliamentary and Municipal Registration Act, 1878 (41 & 42 *Vict. c.* 26), *ss.* 23, 28, *sub-ss.* 10, 11.

The power of a revising barrister to disallow a claim to the lodger franchise after notice of objection is not confined to cases where primâ facie proof of the ground of objection has been given in the manner specified in s. 28, sub-s. 10, of the Parliamentary and Municipal Registration Act, 1878, and the claimant has failed to make good his claim. Although the requirements of sub-s. 10 as to what is to be deemed to be primâ facie proof of the ground of objection may not have been satisfied, the revising barrister is entitled, and ought, to give effect to the evidence given in support of the objection, if in his opinion it outweighs the primâ facie evidence of the claim afforded by the declaration of the claimant, and any other evidence adduced in support of the claim. No appeal lies from a decision of the revising barrister as to the effect of the evidence.

In determining whether lodgings, in respect of which the lodger franchise is claimed, are of the "clear yearly value, if let unfurnished, of 10*l.* or upwards," the rateable value of the house in which the lodgings are situate is an element of proof, though not conclusive, which the revising barrister is entitled to take into consideration.

Where a claim to the lodger franchise is duly made, a revising barrister has no power to make the personal attendance of the claimant at his Court a condition of allowing the claim.

Case stated by the revising barrister for the borough of Hackney.

The appellant, William Jenkins, of 8, Ada Street, Hackney, claimed to vote as an old lodger for the borough of South Hackney. The revising barrister disallowed the claim. The following summary of the material facts stated in the case is taken from the judgment of the Court:—

The claimant duly sent in his declaration annexed to his statement of claim. This was, under the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 23, primâ facie evidence of his qualification. The claimant was objected to on the ground that the lodgings were of insufficient value. The South Hackney list came on for revision in the Registration Court on September 15. Before that date the revising barrister had made a personal inspection of the larger

part of South Hackney with the borough registration officer, who had known the constituency for twenty years. He satisfied himself, he states, that the character of the constituency was very poor, and the houses very small, many streets consisting entirely of houses which were little better than hovels, and that consequently the question whether or not any particular lodgings were worth 10*l.* a year unfurnished was an extremely doubtful one. Upon the claim of Jenkins being opposed by the Conservative agent, the registration officer, in answer to a question of the revising barrister, stated that Ada Street was as poor a street as any which the revising barrister had inspected, and it was proved to the satisfaction of the revising barrister that the rateable value of the whole house in which Jenkins lodged was only 14*l.* per annum, that is 6*s.* less than the amount of the rent which Jenkins in his claim stated to have been paid by him for the lodgings on which his title to be a voter depended. The town clerk, at the request of the revising barrister, had prepared a statement in regard to lodger claimants considered in relation to the rateable value of the houses in which they lodged, and this was also put in evidence. The statement appears in the schedule to the case. The relevant point in it appears to be that no less than 317 lodger claims were like that of Jenkins in respect of lodgings in houses of a rateable value less than 14*l.* per annum, and that in the case of fifty-three claims there were instances of two lodgers claiming in respect of a house whose rateable value ranged from 9*l.* to 20*l.* The revising barrister knew from the statement of the party agents in the previous year that they had by agreement then abstained from opposition to lodger claims. In the present year objection was made by the Conservative agent in numerous cases on the ground of insufficiency of value, and to the claim of Jenkins amongst others. The revising barrister ordered all these cases of objection to stand over until the evening sitting of September 18, stating in Court that if the claimants respectively satisfied him that they paid rent amounting to 10*l.* per annum, or that their respective lodgings were of the prescribed value, he would allow the claims, but that otherwise he would not allow them. He also gave to each claimant a notice in

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writing, which, in the case of Jenkins, ran thus: "To Mr. William Jenkins, of 8, Ada Street, N.E. Take notice that your claim to vote as a lodger has been objected to on the ground that your lodgings are not of the clear yearly value of 10*l.*, if let unfurnished. Your claim will, or may, be disallowed unless you produce, or cause to be produced, to me, at the evening sitting of my Court, commencing at 6.30 P.M., on Friday, the 18th of September, 1903, your rent-book, or other sufficient evidence, that your said lodgings are of the clear yearly value of 10*l.* or upwards, if let unfurnished." On September 18, according to the case, Jenkins did not attend. He sent no letter or other communication. No explanation of this absence was given. The revising barrister disallowed the claim. (1)

(1) Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 23: "In the case of a person claiming to vote as a lodger, the declaration annexed to his notice of claim shall, for the purposes of revision, be primâ facie evidence of his qualification."

Sect. 28: "(9.) Subject as herein and otherwise by law provided, the revising barrister shall retain the name of every person not objected to, and also of every person objected to, unless the objector appears by himself or by some person on his behalf in support of his objection.

"(10.) If the objector so appears the revising barrister shall require him, unless he is an overseer, to prove that he gave the notice or notices of objection required by law to be given by him, and to give primâ facie proof of the ground of objection, and for that purpose may himself examine and allow the objector to examine the overseers or any other person on oath touching the alleged ground of objection, and unless such proof is given to his satisfaction shall, subject as herein and otherwise by law provided, retain the name of the person objected to.

"An objection made under this Act by overseers shall be deemed to cast upon the person objected to the burden of proving his right to be on the list.

"The primâ facie proof shall be deemed to be given by the objector if it is shewn to the satisfaction of the revising barrister by evidence, repute, or otherwise, that there is reasonable ground for believing that the objection is well founded, and that by reason of the person objected to not being present for examination, or for some other reason, the objector is prevented from discovering or proving the truth respecting the entry objected to.

"(11.) If such proof is given by the objector as herein prescribed, or if the objection is by overseers, then unless the person objected to appears by himself or by some person on his behalf, and proves that he was entitled on the last day of July then next preceding to have his name inserted in the list in respect of the qualification described in such list, the revising barrister shall expunge the name of the person objected to."

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Robson, K.C., and *Lewis Thomas*, for appellant. The revising barrister was wrong in disallowing the claim. The meaning of the statement made in Court by the barrister on September 15, and of the notice sent to the appellant, was that if the appellant did not attend in person to support his claim it would be disallowed. A revising barrister has no power to make the personal attendance of the claimant a condition precedent to the granting of the claim. By s. 23 of the Parliamentary and Municipal Registration Act, 1878, in the case of a person claiming to vote as a lodger, the declaration annexed to his notice of claim shall for the purposes of revision be primâ facie evidence of his qualification. Then, by s. 28, sub-s. 10, it is provided that unless the objector appears and gives primâ facie proof of his objection, the name of the person objected to shall be retained. By the last paragraph of sub-s. 10 primâ facie proof shall be deemed to have been given by the objector if the barrister is satisfied first, by evidence, repute, or otherwise, that the objection is well founded; and, secondly, that by reason of the absence of the claimant the objector is prevented from discovering the truth respecting the entry objected to. By sub-s. 11, if primâ facie proof is given the objection is upheld unless the claimant appears by himself or some other person and proves his claim. In the present case primâ facie proof of the objection was not given. The only evidence before the barrister was the rateable value of the house. That is not sufficient to displace the primâ facie evidence of the claim contained in the declaration: *Flynn's Case* (1); nor was the objector prevented by the absence of the claimant from proving his objection. He might have obtained other evidence, e.g., the claimant's landlord could have been called. Therefore, neither branch of the last paragraph of sub-s. 10 having been satisfied, there was no primâ facie proof of the ground of objection, and, that being so, sub-s. 10 of s. 28 in express terms requires the barrister to retain the name of the person objected to.

H. Sutton, for the respondent. The facts stated in the case do not bear out the contention that the personal attendance of

(1) W. N. (1900) 230.

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the appellant was made a condition of allowing his claim. There was primâ facie proof of the ground of objection, and, as the claimant did not appear either by himself or by some person on his behalf to prove his qualification, his claim was rightly disallowed. The language of the latter part of sub-s. 10 of s. 28 is intentionally made very wide. The barrister has to be satisfied either by evidence, repute, or otherwise. In the present case he had knowledge of the fact that in previous years there had been an agreement between the agents not to object to lodger claims on the ground of want of value; from personal inspection of the neighbourhood he was acquainted with the general character of the houses in respect of which the claims were made, and there was evidence that the rateable value of the house in which the appellant lodged was only 14*l*. There was, therefore, ample material on which he could be satisfied that there was reasonable ground for believing that the objection was well founded. With regard to the argument that the objector was not prejudiced by the absence of the claimant, it is to be observed that sub-s. 10 only deals with certain ways in which the primâ facie proof of objection shall be "deemed" to have been given; but the section is not exclusive, and if the revising barrister has evidence before him which satisfies him that the claim is not good, then there is nothing to prevent him from acting on that evidence, although all the requirements of the latter part of sub-s. 10 may not have been complied with.

Robson, K.C., replied.

Cur. adv. vult.

Dec. 21. The judgment of the Court (Lord Alverstone C.J., Kennedy, and Darling JJ.) was read by

KENNEDY J. This is an appeal from the decision of the revising barrister for the borough of Hackney, whereby he disallowed the claim of William Jenkins, of 8, Ada Street, Hackney, to vote as an old lodger for the borough of South Hackney. [The learned judge stated the facts as set out above, and continued:—]

These being the facts, the appellant contends that the decision was wrong in a point of law necessary to the decision of the case (the Registration Act of 1843, s. 42). The same statute provides that there could be no appeal on a question of fact only, or upon the admissibility or effect of any evidence or admission adduced or made in any case to establish any matter of fact only. The points of law put forward by the appellant are two. He says, first, that the revising barrister improperly made the personal appearance of the claimant a condition of his allowance of the claim; secondly, that the claimant having by his declaration given that which by the express terms of the Parliamentary and Municipal Registration Act, 1878, s. 23, was primâ facie evidence of his qualification, and the objector not having given (it is contended) that which is to be deemed to be primâ facie proof of objection under s. 28, sub-s. 10, of the same statute, the revising barrister was not in point of law entitled to require of the claimant what he did require by his oral notice given in Court on September 15, and by the notice of the same date sent to the claimant in writing, and upon the claimant's failure to comply with these requirements to disallow the claim.

As to the first point, we are clearly of opinion that if a revising barrister in such a case as the present made the personal attendance of a claimant a condition of the allowance of his vote he would be doing that which the law does not authorize. No statutory sanction for such a requirement was cited to us, and we are aware of none. The only way in which the claimant's personal attendance can be compelled is under the provisions of s. 36, which empowers the revising barrister by summons under his hand to require any person to attend and give evidence or produce documents. Sect. 28, sub-s. 11, to which we shall refer presently, makes sufficient the appearance of the claimant "by himself or by some person on his behalf." In commenting upon this enactment, Mr. Rogers, in the 16th edition of his work on Elections, at p. 322 speaks of the words as dispensing with the necessity of personal attendance of the person objected to if he is represented by some one in Court. "But, of course," he adds, "the absence of a person

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objected to will in some cases weigh with the revising barrister in deciding as to the facts of the case." If in this case the revising barrister could be shewn to have made the allowance of the claimant's vote dependant upon his compliance with a requirement of personal attendance and had disallowed the claim because the claimant did not personally appear, we should be of opinion that his decision could not be supported. But, as we understand the facts, although the revising barrister seems by the statements of paragraphs 14 and 21 of the special case to have entertained a mistaken opinion on this point of the personal appearance in Court, it appears to us to be the fair interpretation of the special case and of the exhibit "W. J. 3," which we have already cited, that he did not disallow this vote, or intimate, either by his statement in Court, or by the written notice, that he would disallow it, on the ground of the failure of the claimant to appear personally on September 18. He gave notice that he should require certain evidence to support the claim; but neither orally nor by notice did he insist upon the personal attendance of the claimant; in fact, as the case tells us, in some cases where claimants were unable to attend he accepted as sufficient evidence letters written by them to him stating that they had paid rent sufficient to satisfy the statutory standard of qualification. We desire to express our view that the statute does not make personal attendance absolutely necessary: such a requirement might entail serious hardship in the case of these lodger claimants, who, to a very large extent, form part of a very poor class which could ill afford to bear the loss of time involved in personal attendance at the proceedings of the revising barrister's Court.

We now pass to the second point made by the appellant, that the provisions of s. 28, sub-s. 10, have not been complied with. In our view this contention rests upon an erroneous conception of the meaning and intent of this enactment. It is not intended by the Legislature in our view absolutely to confine the right of the revising barrister to disallow a claim, when the claimant has by his declaration given primâ facie evidence of his qualification, to the case of such primâ facie

proof of the ground of objection as is there described. Sect. 28, sub-s. 10, deals only with one special method of establishing a primâ facie case against the claim, and then in sub-s. 11 goes on to say that in case of such primâ facie proof of objection being given, the revising barrister shall (not may) expunge the name of the person objected to unless the person objected to appears by himself or by some person on his behalf and proves his title to inclusion in the list of voters. The section does not prevent the revising barrister from considering, and, if he thinks it just, giving effect, by a decision adverse to the claim, to any proper evidence against the claim. If, to take a single example, the objector, in order to meet the primâ facie evidence afforded by the declaration, at once called the landlord or produced the lodger's rent-book, and by this evidence proved that rent much below the statutory standard was paid, the revising barrister would, in our view, clearly be entitled in point of law to say that if the matter stood there he had evidence which entitled him to reject the claim. As to the weight of such evidence and the proper effect to be given to it, he is the constituted judge, and no appeal lies from his decision. Sect. 28, sub-ss. 10, 11, merely enact in substance that if the objector's primâ proof of the ground of the objection is made out in a particular way, then, unless it is rebutted in a particular way, the revising barrister must disallow the claim. If the objector's case does not satisfy s. 28, sub-s. 10, it still may consist of evidence against the claim which the revising barrister is entitled to weigh, and may give (and ought to give) effect to if he thinks its weight is sufficient to outweigh the primâ facie evidence of the claimant's declaration, and any other evidence confirmatory of the declaration which the claimant may think proper to adduce. In this case the revising barrister had on one side the declaration, and on the other side the rating of the house with information as to the character of the street in which it was situated. The rating was not necessarily conclusive evidence against the claim; it was evidence only, as the Court pointed out in regard to the valuation roll in *Kellie* v. *Little* (1); and the revising barrister

(1) (1897) 24 R. 379; Lawson's Registration Cases, 1894–1897, p. 132.

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decided to give the claimant the chance, if he wished to take it, of "producing or causing to be produced" at a later sitting of the Court evidence either by his rent-book or otherwise in support of the declaration. Many other claimants in the like position availed themselves of the chance, and succeeded; this claimant did not do so; and the revising barrister, in this state of things, held adversely to the claim. He had to decide what effect he ought to give to the evidence pro and con; and even if this Court could upon the same evidence have decided otherwise it has no power to overrule his decision.

Appeal dismissed.

Solicitors for appellant: *Russell Cooke & Co.*
Solicitor for respondent: *Solicitor to the Treasury.*

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Jan. 15.

KNUCKEY *v.* REDRUTH RURAL DISTRICT COUNCIL.

Mine—Owner—Duty to fence—Metalliferous Mines Regulation Act, 1872 (35 & 36 *Vict. c.* 77), *ss.* 13, 41—*Public Well in Shaft of abandoned Mine—Vested in Local Authority—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 64.

By s. 13 of the Metalliferous Mines Regulation Act, 1872, where a mine is abandoned or the working thereof is discontinued, the owner thereof and every other person interested in the minerals of the mine shall cause the top of the shaft to be fenced; by s. 41 the term "mine" includes a shaft belonging to a mine, and the term "owner" does not include a person who is merely the owner of the soil and not interested in the minerals of the mine.

The shaft of an abandoned mine contained water, and was used as and was in fact a public well, which under s. 64 of the Public Health Act, 1875, was vested in the defendants, the local authority:—

Held, that the defendants were not the owners of the mine or of the shaft within the Metalliferous Mines Regulation Act, 1872, and were, therefore, not liable in an action for damage sustained through the top of the shaft not having been fenced.

APPEAL from the county court of Cornwall holden at Redruth.

The action was brought to recover damages for injuries

sustained by a horse belonging to the plaintiff by reason of its having fallen down a well. The well, which was unfenced, was formed by the shaft of an abandoned mine within the district of which the defendants were the sanitary authority. The plaintiff's case was that the well was a public well and had therefore, under s. 64 of the Public Health Act, 1875 (1), vested in the defendants; that the defendants were bound under s. 13 of the Metalliferous Mines Regulation Act, 1872 (2), to fence the top of the shaft in which the well was, and that the defendants were liable to the plaintiff in damages for the injuries sustained by the plaintiff's horse through the defendants' neglect of their statutory duty.

The county court judge found as a fact that the well was a public well and that it was an old pit shaft; but he held that the defendants were not owners of the mine or persons interested in the minerals of the mine within s. 13 of the Act of 1872, and that they were, therefore, not under any statutory duty to fence the shaft. The county court judge accordingly gave judgment for the defendants. The plaintiff appealed.

Bethune (*R. C. Glen* with him), for the plaintiff. The county court judge has found as a fact, and there was evidence to

(1) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 64, provides that all existing public wells "shall vest in and be under the control of" the local authority.

(2) Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77,) s. 13: "Where any mine to which this Act applies is abandoned or the working thereof discontinued, at whatever time such abandonment or discontinuance occurred, the owners thereof, and every other person interested in the minerals of the mine, shall cause the top of the shaft and any side entrance from the surface to be and to be kept securely fenced for the prevention of accidents."

Sect. 41: "In this Act, unless the context otherwise requires,—

"The term 'mine' includes . . . . all the shafts . . . . in and adjacent to a mine . . . . and belonging to the mine.

"The term 'owner' when used in relation to any mine means any person or body corporate, who is the immediate proprietor, or lessee, or occupier of any mine, or of any part thereof, and does not include a person or body corporate who merely receives a royalty, rent, or fine from a mine, or is merely the proprietor of a mine subject to any lease, grant, or licence for the working thereof, or is merely the owner of the soil and not interested in the minerals of the mines."

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support the finding, that the well is a public well. It follows that under s. 64 of the Public Health Act, 1875, the well is vested in the defendants. The vesting of the well in the defendants makes them the owners of the well: *Coverdale* v. *Charlton* (1); *Taylor* v. *Corporation of Oldham* (2); and the well includes not only the water in it, but the walls of the shaft. In other words, the shaft is the well. By s. 41 of the Metalliferous Mines Regulation Act, 1872, the word "mine" in that Act includes the shaft of a mine, and by the same section the term "owner" includes the immediate proprietor or the occupier of a mine or any part thereof. The vesting of the well in the defendants brings them within that definition as owners of a part of the mine, and therefore they are owners of a mine within s. 13, and are under a statutory duty to fence the top of the shaft: *Evans* v. *Mostyn.* (3) An action will lie for a breach of that duty whereby damage has been caused: *Dublin United Tramways Co.* v. *Fitzgerald.* (4)

[*Foster* v. *Owen* (5) was also referred to.]

Schiller, for the defendants. The defendants are not the owners of the mine within s. 13. The obligation to fence is imposed by that section upon persons beneficially interested in a mine or in the minerals in it—that is to say, a person who has been actually working the mine and has discontinued doing so, or a lessor of a mine. The defendants do not come within either category. Supposing that the real owner of this mine desired to recommence working it, it would be impossible for him to do so if the defendants are the owners within s. 13 and, as owners, bound to fence the shaft. The defendants are not "interested in the minerals of the mine," and are therefore expressly excluded by s. 41 from the definition of owner. Further, the vesting of the well in the defendants does not make them the owners of the well, even when regarded as something distinct from the mine. They are bound to maintain the well quâ well, but it is not their property, any more than, as was pointed out in *Coverdale* v. *Charlton* (6), the soil

(1) (1878) 4 Q. B. D. 104.
(2) (1876) 4 Ch. D. 395.
(3) (1877) 2 C. P. D. 547.
(4) [1903] A. C. 99.
(5) (1892) 62 L. J. (M.C.) 7.
(6) 4 Q. B. D. 104.

of a street is the property of the local authority in which the street is vested.

[He was stopped.]

Bethune, in reply. Sect. 64 not only says that a public well shall vest in, but that it shall also be under the control of, the local authority. The argument for the defendants treats "vest" as meaning no more than under the control of. [He referred to *Mayor of Tunbridge Wells* v. *Baird*. (1)]

LORD ALVERSTONE C.J. In this case the county court judge has found as a fact that this well was a public well, and there was evidence upon which he could so find. The well, therefore, became vested in the defendants under s. 64 of the Public Health Act, 1875; that, however, is not conclusive of this case. I agree that according to the ordinary principle of law the vesting of a well in a public authority under s. 64 confers upon the public authority some right of property in the well; for example, the public authority would have the right to take steps to make the well an efficient well. But the case against the defendants is not put upon the ground of their failure to perform that duty, for it is not alleged against them that they as owners of the well allowed it to be in a dangerous condition. The plaintiff's case is based upon s. 13 of the Metalliferous Mines Regulation Act, 1872, and the question which we have to determine is whether the defendants were bound to perform the statutory duty of fencing the shaft of this mine imposed by that section. [His Lordship read the section.] If the section stood alone, without the interpretation section, it would be clear that the duty to fence is placed upon the owner of the mine, and upon every other person interested in the minerals of the mine; the word "thereof" clearly refers to the word "mine." Sect. 41 extends the meaning of the word "mine" in the Act so as to make it include every shaft in and adjacent to and belonging to a mine; and I agree, therefore, that the owner of a shaft connected with a mine would be a person liable to fence under s. 13. But s. 41 goes on to define the term "owner" when used in relation to a mine, and it is expressly provided that it does not include,

(1) [1896] A. C. 434.

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Lord Alverstone C.J.

amongst others, a person who is merely the owner of the soil and not interested in the minerals of the mines. In my opinion, whether you take s. 13 alone or in conjunction with s. 41, it is not the person in whom is vested merely the legal ownership of the soil round the shaft, but the actual owner of the mine or of a shaft connected with the mine, or any other person interested in the minerals of that mine, who is liable under s. 13 to fence the shaft. It is quite clear that the defendants are not interested in the minerals of this mine, and therefore they are not the owners of the mine or of the shaft, so as to bring them under the statutory liability to fence imposed by s. 13. For these reasons I think that the judgment of the learned county court judge was right, and that this appeal must be dismissed.

WILLS J. I am entirely of the same opinion. It seems to me that the keynote to the interpretation of s. 13 is that the liability to fence is cast either upon the actual owner of the mine or upon a person who has an interest, akin to ownership, in the minerals of the mine. That appears from the definition of "owner" in s. 41, which excludes from the term "owner" a person who is merely the owner of the soil and who is not interested in the minerals of the mine. There is no pretence for saying that the defendants are interested in the minerals of this mine; and it follows from that that they are not the owners of the mine, and therefore they are not liable under s. 13 to fence the shaft.

KENNEDY J. I am of the same opinion. It seems to me impossible to say that the result of this well vesting in the defendants under s. 64 of the Public Health Act, 1875, is to render the defendants the owners of the mine within s. 13 of the Act of 1872.

Appeal dismissed.

Solicitors for plaintiff: *Robbins, Billings & Co., for Paige & Grylls, Redruth.*

Solicitors for defendants: *Coode, Kingdon & Cotton, for Walters, Camborne.*

F. O. R.

[IN THE COURT OF APPEAL.]

C. A.
1904
Jan. 29.

BRANDTS, SONS & CO. *v.* DUNLOP RUBBER COMPANY, LIMITED.

Debt, Assignment of—Advance of Money to Vendor of Goods—Direction to pay Price to Lender—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6.

The plaintiffs, who were as bankers financing a firm, which imported india-rubber, had accepted bills drawn by the sellers abroad for the price of india-rubber bought by the firm, and afterwards resold by them to the defendants. When the india-rubber was delivered to the defendants, the firm sent to the plaintiffs a document consisting of two parts, which were detachable from one another, and were in substance as follows. The first part was a letter signed by the firm, and addressed to the defendants, requesting them to sign and forward to the plaintiffs the attached letter, which formed the other part of the document. That letter was addressed to the plaintiffs, and stated that the undersigned begged to confirm that they would remit the price of the india-rubber due from them to the firm direct to the plaintiffs for account of the firm. The plaintiffs forwarded this document to the works belonging to the defendants, where the letter attached was signed by the defendants' manager, who returned it to the plaintiffs. The manager had no authority from the defendants to sign such a document. He omitted to advise the defendants of the fact that he had signed the letter, and they subsequently paid the price of the india-rubber to the firm, who afterwards became bankrupt. In an action brought by the plaintiffs against the defendants for the price of the india-rubber:—

Held, reversing the judgment of Walton J., that the document above mentioned did not constitute an assignment of the debt due from the defendants to the firm, either legal or equitable, and therefore the plaintiffs could not maintain the action.

APPEAL from the judgment of Walton J. in an action tried by him without a jury.

The action was brought by the plaintiffs against the defendants to recover a sum of 3263*l.* 4*s.* 2*d.*, originally due from the defendants to a firm named Kramrisch & Co., for the price of certain india-rubber, but which, as alleged, the defendants, by direction of Kramrisch & Co., had undertaken to pay to the plaintiffs, or, in the alternative, which was absolutely assigned by Kramrisch & Co. to the plaintiffs, of which assignment notice was given to the defendants.

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It appeared that the plaintiffs, who were described as merchant bankers, had been financing a firm called Kramrisch & Co., who carried on business at Liverpool, as importers of india-rubber, which they resold to customers in England. The arrangement, in substance, was that the plaintiffs accepted bills drawn by the sellers abroad of the india-rubber to Kramrisch & Co. against shipping documents, and, when the india-rubber arrived, the plaintiffs handed the bills of lading to Kramrisch & Co. in trust to enable them to effect transhipment; and, when the goods were delivered to customers, Kramrisch & Co. sent to the plaintiffs documents in the form hereafter mentioned, with invoices of the india-rubber resold, which the plaintiffs passed on to the buyers from Kramrisch & Co. with instructions to remit the amount of the invoice direct to the plaintiffs, in order to cover their acceptance.

In accordance with the above-mentioned arrangement, the plaintiffs had accepted bills for the price of two lots of india-rubber sold to Kramrisch & Co., and by them resold to the defendants at the respective prices of 369*l.* 1*s.* 10*d.* and 3263*l.* 4*s.* 2*d.*, the latter being the amount for which the action was brought. On January 3, 1903, Kramrisch & Co. wrote a letter to the plaintiffs, advising them of the receipt for their account of delivery orders for the two lots of india-rubber, and concluding as follows: "And we hereby engage, receiving said goods, to hold same in trust on your behalf, and, as such goods are forwarded to buyers (as per statement overleaf), to send you the new documents (unless forwarded by rail); in any case to grant you the sole and absolute lien on said goods and their proceeds, until you have received full payment plus charges of the advance granted by you to us on said goods for 3430*l.*, and we further engage to hold this transaction separate from any other." On January 6 Kramrisch & Co. sent to the plaintiffs a letter inclosing the document hereafter mentioned, and requesting them to send it on to the defendants for their signature.

The document consisted of two parts, which were detachable from one another. The first part was as follows: "Liverpool, 6th January, 1903. Messrs. The Dunlop Rubber Company,

Limited, Birmingham. Dear Sirs,—We should thank you to kindly sign the attached letter, and forward same to Messrs. Brandts, Sons & Co., London, E.C. Yours truly, Kramrisch & Co." The other part was as follows: "Para Mills, Birmingham, 8th January, 1903. Messrs. Brandts, Sons & Co., 4, Fenchurch Avenue, London, E.C. Dear Sirs,—Herewith we beg to confirm that we shall remit, subject to approval of the goods, the amount of invoices, 369*l.* 1*s.* 10*d.* for 8, and 3263*l.* 4*s.* 2*d.* for 75, packages raw rubber received to-day from Messrs. Kramrisch & Co., Liverpool, when due, direct to your good selves, for account of Messrs. Kramrisch & Co. Yours faithfully, ———" The plaintiffs forwarded the document by letter dated January 7 to the defendants' works at Birmingham where the india-rubber had been delivered, and requested them to sign the letter attached and return it to the plaintiffs. On January 9 the letter was returned to the plaintiffs, having been signed in the name of the defendants by the manager of their works at Birmingham with a rubber stamp. He, however, omitted to advise the defendants' head office in London, where their financial business was carried on, of the letter, and the defendants subsequently paid Kramrisch & Co. the above-mentioned sum of 3263*l.* 4*s.* 2*d.* Kramrisch & Co. had since become bankrupt. The learned judge found as a fact upon the evidence that the manager had no actual authority from the defendants to sign such a document as that before mentioned on their behalf, and that there was no evidence of his having been held out as having such authority; and the Court of Appeal were of opinion that his findings to that effect were correct; but the learned judge held that the before-mentioned document was an absolute assignment of the debt in question by Kramrisch & Co. to the plaintiffs, and notice of such an assignment to the defendants. He therefore gave judgment for the plaintiffs for the amount claimed.

Bray, K.C., and *Schiller*, for the defendants. There was no assignment of the debt to the plaintiffs in this case, nor was there any notice to the defendants of an assignment of it. The document sent by Kramrisch & Co. to the plaintiffs on

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January 6, and relied on by them, is not in terms an assignment, nor does it by necessary implication import one. It may not be necessary, in order that a document should be an assignment, that the word "assign," or any other technical term, should be used, but the document ought clearly to import that the property in the debt is transferred, so that the debtor may know that he can safely pay the alleged assignee. A mere request or authorization to pay a third party is not enough, for such a mandate is revocable. All that the document here amounts to is a request to the defendants to undertake to pay the amount to the plaintiffs for account of Messrs. Kramrisch & Co. That does not import an assignment, either legal or equitable. The plaintiffs in this case are suing in their own name, not in that of Kramrisch & Co.; so they must prove an absolute assignment under the Judicature Act, 1873, s. 25, sub-s. 6.

[They cited *Ex parte Hall* (1); *Harding* v. *Harding* (2); *Durham Brothers* v. *Robertson*. (3)]

Hamilton, K.C., and *Loehnis*, for the plaintiffs. No business man, familiar with the manner in which such transactions as these are carried out, would read such a document as that in question as being a mere request by Kramrisch & Co. to the defendants to pay the sums therein mentioned to bankers for their convenience. The document amounts to a statement to the defendants by Kramrisch & Co. that, as between them and the plaintiffs, the latter are the persons who ought to receive those sums. It is substantially an absolute assignment of them to the plaintiffs. The business meaning of the words "for account of Messrs. Kramrisch & Co." in such a document is only that the plaintiffs' receipt for the money shall be good as against Kramrisch & Co. No one would send such a document to his bankers in the ordinary sense of the term, in order to be sent on by them to his debtor. The defendants are requested to sign the letter attached, in order to prevent any subsequent dispute as to the assignment of the debt, or notice of it, and the setting up by the defendants of any equity as

(1) (1878) 10 Ch. D. 615. (2) (1886) 17 Q. B. D. 442.
(3) [1898] 1 Q. B. 765.

against the plaintiffs' claim. The basis on which the defendants are so requested must surely be that the debt is assigned to the plaintiffs. *Harding* v. *Harding* (1) is a strong authority in the plaintiffs' favour. The surrounding circumstances may be looked at in order to construe the document which came into existence in the accustomed course of commercial business, whereby the plaintiffs, as merchant bankers, were financing the operations of importers of goods for sale in this country. If this document is not an absolute assignment of the debt within s. 25 of the Judicature Act, 1873, it is submitted that there was an equitable assignment of the debt. The reason why in a Court of Equity the assignor has generally to be made a party, either as a co-plaintiff or co-defendant, does not exist in the present case. The reason for that practice is that the assignor may be bound; but here Kramrisch & Co. have already been paid, and have given a receipt, and no claim could be set up by them.

[They cited *Brice* v. *Bannister* (2); *Percival* v. *Dunn.* (3)]

Bray, K.C., in reply. (4)

LORD ALVERSTONE C.J. This case raises a point of some difficulty and importance. We are told that documents, such as that here in question, are common in commercial transactions; and we are asked to say that, being consistent only with an assignment to the plaintiffs by Kramrisch & Co. of the debt due from the defendants to them, they must be construed as such an assignment, either legal or equitable, as entitles the plaintiffs to maintain an action for the debt against the defendants. Upon considering the arguments addressed to us, I am unable to come to that conclusion.

It was contended in the first place that the plaintiffs had a

(1) 17 Q. B. D. 442.
(2) (1878) 3 Q. B. D. 569.
(3) (1885) 29 Ch. D. 128.
(4) Only the arguments on the question whether the document relied on was an assignment of the debt are given. Other questions were argued, namely, as to the existence of authority on the part of the defendants' manager to sign the letter undertaking to remit the debt to the plaintiffs, or to receive notice of an assignment of the debt. But these were substantially questions of fact, and do not call for a report.

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right to sue under s. 25 of the Judicature Act, 1873, because there had been an absolute assignment of the debt by writing under the hand of the assignors, not purporting to be by way of charge only, of which express notice in writing had been given to the debtors. I pass by the question of notice, because no question can arise thereon, unless we come to the conclusion that this document was an assignment under the hand of the assignors. It was attempted to make out that there was such an assignment by taking together the two parts of the document inclosed in the plaintiffs' letter of January 7 to the defendants. The first of these is in the form of a letter addressed to the defendants, and runs thus: "Dear Sirs,—We should thank you to kindly sign the attached letter, and forward same to Messrs. Brandt, Sons & Co., London, E.C. Yours truly, ———." That request is signed "Kramrisch & Co." If the other part of the document, namely, the letter attached, reasonably construed, necessarily indicated an assignment, either legal or equitable, of the debt to the plaintiffs, then I think it might be said that the assignment was under the signature of Kramrisch & Co. The other part of the document is a letter addressed to Messrs. Brandts, Sons & Co., and is as follows: "Dear Sirs,—Herewith we beg to confirm that we shall remit, subject to approval of the goods, the amount of invoices, 369*l.* 1*s.* 10*d.* for 8, and 3263*l.* 4*s.* 2*d.* for 75, packages of raw rubber received to-day from Messrs. Kramrisch & Co., when due, direct to your good selves, for account of Messrs. Kramrisch & Co. Yours faithfully, ———." It was argued for the plaintiffs that the words "for account of Messrs. Kramrisch & Co." really meant that the plaintiffs were empowered to give a receipt, which should bind Messrs. Kramrisch & Co., and that was the only business meaning of the words in such a document. If that explanation of these words were satisfactory, it would no doubt remove one of the difficulties in the way of holding this document to be an assignment; but, taking the words in conjunction with the earlier part of the document, I am not convinced that they could only bear that meaning to business men. The document does not in terms purport to be an

assignment; it purports merely to be a request addressed to the defendants by Kramrisch & Co. that they will agree to remit the amounts therein mentioned to the plaintiffs. If the undertaking so to remit had been signed by the defendants through some agent thereunto authorized, they then would have been in the position of the defendants in *Harding* v. *Harding* (1), and liable to the plaintiffs on the ground that they had become trustees of the money for them. After endeavouring, as far as I can, to appreciate the argument for the plaintiffs, I cannot see any satisfactory answer to the difficulty which I pressed more than once upon the plaintiffs' counsel. I cannot see why it is necessarily to be assumed as a foundation for the second part of the document, namely, that beginning "Herewith we beg to confirm that we shall remit," that there has been an assignment of the debt; and still less do I see why the document itself must be treated as an assignment signed by Kramrisch & Co., because they have requested the defendants to sign the attached letter. It seems to me that the documents are equally consistent with some previous verbal bargain between the plaintiffs and Kramrisch & Co. by which the money was to be received by the plaintiffs on behalf of Kramrisch & Co. and credited to their account, or with some arrangement for a lien or floating charge of some kind, not amounting to an assignment of the debt, by virtue of which the money was to be subject to some right of the plaintiffs, who were financing Kramrisch & Co. I think business men, with experience of transactions of this kind, would readily suggest arrangements by reason of which it was intended that these moneys should come into the hands of the plaintiffs, without there necessarily being an absolute assignment of the debt to the plaintiffs; and I think that, not only is the document consistent with some other state of things than an assignment of the debt, but also that it is impossible to treat it as being itself such an assignment. I do not wish to base my judgment on the fact that, a few days before, there had been an actual document, whereby Messrs. Kramrisch & Co. were constituted trustees for the plaintiffs of these moneys, and a

(1) 17 Q. B. D. 442.

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lien was given to the plaintiffs; but I must point out that, as the Master of the Rolls suggested during the argument, if the document cannot on the face of it be ascertained to be an assignment, and recourse must be had to the surrounding circumstances, one is met at once by the fact that in this particular case the plaintiffs had not got an assignment of the debt, unless the document per se constitutes one. I come to the conclusion that this document, not purporting on the face of it to be an assignment, but merely an authority to the defendants to pay these moneys to the plaintiffs for account of Kramrisch & Co.—though it would no doubt, if duly assented to by the defendants, involve them in obligations—does not fulfil the requirements necessary to entitle the plaintiffs to maintain this action, whether as legal or equitable assignees of the debt sued for, because it is not an assignment of the debt, either legal or equitable.

I do not think that any of the cases which have been referred to really do more than illustrate the broad principles which have to be applied in such cases. In *Harding* v. *Harding* (1) Wills J. did undoubtedly express an opinion that the document there in question might be a document of assignment within the meaning of s. 25 of the Judicature Act, 1873. I do not wish to rely too much on any mere verbal distinction between the document in that case and that in the present case. I think that a good deal might be said in favour of the view that the words "I hereby instruct the trustees in power to pay to my daughter" in that case constituted an assignment; but I do not think that it was necessary to rely on that, because the real ground of the decision in *Harding* v. *Harding* (1) appears to me to have been that the trustees had assented to the instruction, and therefore were bound on equitable principles. Again, I do not think that the case of *Ex parte Hall* (2) can be treated as affording any assistance in the present case further than as illustrating the principles that govern cases of this kind; for that case really seems to have turned on the fact that the transaction related to an interest in land, and so came within the Statute of Frauds, and is

(1) 17 Q. B. D. 442. (2) 10 Ch. D. 615.

really no authority on the question whether the words "I hereby authorize and request you to pay" could or could not, apart from the provisions of that statute, under the circumstances of the case, amount to an assignment. So that I think neither of the two authorities mainly relied on by the plaintiffs' and defendants' counsel respectively really govern the present case. With regard to the case of *Brice* v. *Bannister* (1), I agree that the principal ground for the difficulty expressed by Chitty L.J. in *Durham Brothers* v. *Robertson* (2) with regard to that decision was not so much that the language employed in *Brice* v. *Bannister* (1) could not amount to an assignment, as that the assignment, if any, being only of part of the debt, could not be within s. 25 of the Judicature Act, 1873. Still, speaking for myself, I must say that I think that there is a great difference between the words of the document in question in *Brice* v. *Bannister* (1), which were, "I do hereby order, authorize, and request you to pay," and the nature of the document, and the transaction in the present case, where the document itself plainly implies the possibility of the existence of previous documents which had passed between the plaintiffs and Kramrisch & Co. I therefore come to the conclusion that there was no assignment to the plaintiffs of the debt due from the defendants to Kramrisch & Co. so as to entitle the plaintiffs to maintain this action. That being so, it is unnecessary to deal with the question whether there was due notice of assignment to the defendants. With regard to the rest of the case, I agree with Walton J. that there was not any evidence of an actual authority given to the defendants' manager to sign the document in question, or that he was held out by the defendants as having such authority, or that the plaintiffs had altered their position on the faith of the existence of such authority. For these reasons I think the appeal must be allowed.

COLLINS M.R. I agree. I must admit that my mind has fluctuated somewhat during the course of the argument, and I need hardly say that, in differing from Walton J. on such a

(1) 3 Q. B. D. 569. (2) [1898] 1 Q. B. 765.

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Collins M.R.

point, I do so with diffidence; but on the whole I have come to the conclusion that this appeal must be allowed, and I only propose to add a few words on the main question in the case. It seems to me that the document, the two parts of which, taken together, are relied on in the present case as constituting an assignment, does not in point of fact fulfil the requirements of s. 25 of the Judicature Act, 1873. On the face of the document there is no assignment, either absolute or conditional, but only a request from Kramrisch & Co. addressed to the defendants that they will give an undertaking to the plaintiffs to pay them the sums which would, in the absence of such an arrangement, be payable by the defendants to Kramrisch & Co. It may be that the terms of that request seem to assume that some arrangement had previously been made between the plaintiffs and Kramrisch & Co., which might conveniently be carried out by means of the letter which the defendants are requested to sign; but there is nothing on the document that amounts to an absolute assignment of the debt to the plaintiffs. The document may presuppose some arrangement between the plaintiffs and Kramrisch & Co. as to the moneys payable by the defendants, but such a presupposition does not amount, I think, to an absolute assignment within the meaning of s. 25 of the Judicature Act, 1873. The document in question was sent by Kramrisch & Co. to the plaintiffs, and consists of two parts, one being a letter addressed by Kramrisch & Co. to the defendants, requesting them to sign and forward to the plaintiffs the letter attached, which forms the other part of the document. That letter, in substance, states that the undersigned beg to confirm that they will remit the amounts mentioned direct to the plaintiffs for account of Kramrisch & Co. The word "confirm" is no doubt often used in business documents in a way that is not strictly correct, but here it may quite possibly be used in its proper sense as meaning the confirmation of some previous arrangement. The letter, if signed by the defendants, would no doubt import an undertaking by them to pay direct to the plaintiffs the sums due to Kramrisch & Co. from the defendants as the price of india-rubber sold to them. The document, taken as a

whole, is, as it seems to me, an invitation to the defendants to confirm, and become bound by, some arrangement that the defendants should pay those moneys to the plaintiffs; but I do not find on the face of it any absolute assignment in writing of a debt. No such assignment appearing on the face of the document taken by itself, we are asked to collect one by reference to other documents which have passed between the parties and other surrounding circumstances, so far as they may be admissible in order to construe the document in question. But, when I look into those circumstances, I find from the previous correspondence that what I rather thought was primâ facie to be inferred from the document itself had in fact occurred, namely, that an arrangement had been previously made between the plaintiffs and Kramrisch & Co. that the plaintiffs should have a lien on certain documents and on the debt due from the defendants. It appears to me that the terms of the document relied on are more consistent with some such arrangement than with an absolute assignment of the debt. If there had been such an assignment, I do not see why it should have been necessary to invite the defendants to bind themselves to the plaintiffs to remit the amount of the debt to them direct. I think also that the words "for account of Messrs. Kramrisch & Co." indicate that the document is not an assignment. They appear to me to suggest, or at all events to be consistent with, the retention by Kramrisch & Co. of some interest in the debt which is incompatible with an absolute assignment of it. Unless the plaintiffs can make out the existence of such an assignment, they fail to satisfy the requirements of the 25th section of the Judicature Act, 1873.

ROMER L.J. I am of the same opinion, and will only add a few observations on the main point in the case. The question is whether the document relied upon by the plaintiffs constituted in itself an assignment of the debt, and notice of that assignment to the defendants. In using the word "assignment," I include for the present purpose an equitable assignment not within s. 25 of the Judicature Act, 1873. There is no doubt considerable difficulty in construing the document in

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Romer L.J.

this case, and none the less so, because we are bound to confine our attention to the terms of the document itself, and not bring into consideration the relations between the plaintiffs and Kramrisch & Co., which were not disclosed by the document, and were not known to the defendants. The document on its face appears to me, at any rate in terms, merely to import a request by Kramrisch & Co. to the defendants that they would bind themselves to pay to the plaintiffs the debt which they owed to Kramrisch & Co. The document does not state the reason why Kramrisch & Co. or the plaintiffs should make such a request, or indicate the nature of the relations between Kramrisch & Co. and the plaintiffs, except so far as to shew that the plaintiffs were to receive the moneys remitted to them "for account of Messrs. Kramrisch & Co." There is no mention or suggestion, as it appears to me, of any charge on or assignment of the debt. I do not think the defendants were bound to speculate as to what the relations between Kramrisch & Co. and the plaintiffs might be, or why they wished the defendants to sign the document put before them. The defendants were not bound to sign that document; and I ask myself the question whether it was in such terms that they were bound to assume, if they did not sign it, that Kramrisch & Co. had, in that condition of affairs, given them a clear mandate to pay the amount to the plaintiffs, which they could not afterwards revoke. It does not appear to me that it was, and, although the case is not free from difficulty to my mind, I do not think the defendants were bound to regard the document itself as being an assignment of the debt or as giving notice of the existence of such an assignment.

Appeal allowed.

Solicitors for plaintiffs: *Hollams, Sons, Coward & Hawksley.*
Solicitors for defendants: *John B. & F. Purchase.*

E. L.

WARD *v.* HADDRILL.

1904
Jan. 27.

County Court—Cross-judgments—Execution—Payment of Judgment Debt into Court—Solicitor's Lien for Costs—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 150.

By s. 150 of the County Courts Act, 1888, "if there shall be cross-judgments between the parties, execution shall be taken out by that party only who shall have obtained judgment for the larger sum, and for so much only as shall remain after deducting the smaller sum, and satisfaction for the remainder shall be entered, as well as satisfaction on the judgment for the smaller sum; and if both sums shall be equal, satisfaction shall be entered upon both judgments":—

Held, that this section applied where there were cross-judgments in separate actions, and not merely where there were cross-judgments upon claim and counter-claim in the same action; also that it applied where the party against whom judgment had been obtained for the larger sum had paid that sum into court so that no execution was taken out; also that the party against whom judgment had been obtained for the larger sum was entitled to have deducted from the sum paid into court the smaller sum for which he had obtained judgment, and that the balance only between the larger and smaller sums should be paid out to the party who had obtained judgment for the larger sum, notwithstanding that the solicitor for the party who had obtained judgment for the larger sum claimed a lien for his costs which exceeded in amount the sum paid into court.

APPEAL from a decision of the judge of the Wandsworth County Court.

The plaintiff brought two actions in the county court against the defendant, in the first of which judgment was given for the plaintiff for 21*l.*, and in the second judgment was given for the defendant with costs taxed at 5*l.* The defendant paid the amount of the judgment in the first action into court in that action. The plaintiff did not pay into court the amount of the taxed costs in the second action. The defendant applied to the county court judge for an order that the sum of 21*l.* paid into court by the defendant in the first action be not paid out of court to the plaintiff or her solicitor unless and until the plaintiff had paid into court the sum of 5*l.*, being the amount of the defendant's taxed costs in the second action; or, in

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the alternative, for an order that out of the sum of 21*l.* there be paid out to the defendant or his solicitors the sum of 5*l.* On the hearing of this application it was objected on behalf of the plaintiff that her solicitor had a lien for his costs upon the sum in court; that those costs amounted to more than the sum in court; and that the judge had, therefore, no power to order any less sum than the whole sum in court to be paid out to the plaintiff or her solicitor.

The county court judge ordered that the amount (21*l.*) paid into court as due from the defendant to the plaintiff under the judgment in the first action should be subject to a set-off in respect of the amount (5*l.*) due under the judgment in the second action; that the balance only should be paid out to the plaintiff, and that 5*l.* should be paid out of the 21*l.* to the defendant.

The plaintiff appealed from that order.

Douglas Hogg, for the appellant. The county court judge had no power to make the order. The 21*l.* paid into court by the defendant under the judgment in the first action was subject to the lien of the plaintiff's solicitor for his costs. Sects. 113 and 150 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), are relied on as justifying the order, but they have not that effect. Sect. 113 only gives the judge a discretion with respect to costs not otherwise provided for in the Act; it does not touch the question of a solicitor's lien on moneys in court for his costs. Nor does s. 150. The provision that where there are cross-judgments execution shall only issue for the balance of the larger over the smaller sum recovered is subject to that well-established right of lien. It cannot have been intended by the Legislature that the solicitor should be deprived of that right. It is not taken away by any express words. Sect. 150 only operates with respect to the issue of execution; it cannot apply where the amount of the judgment has been paid into court, and no execution can be taken out. A provision dealing with the case of money paid into court was probably omitted per incuriam. Sect. 150 only applies where there are cross-judgments on a claim and counter-claim in

the same action, not where the cross-judgments are in separate actions.

Thorn Drury, for the respondent. The county court judge had power to make the order under s. 150 of the County Courts Act, 1888, which provides in clear terms that the amount of the smaller sum for which judgment has been obtained shall be deducted from the larger, and that the plaintiff who has obtained judgment for the larger sum shall only be entitled to the balance. The solicitor's right of lien can only be exercised in respect of that balance. The substantial intention of the enactment would not be carried out if the person who had obtained judgment for the smaller sum were compelled to wait until execution had been issued before he could get the benefit of the right of set-off which the Act gives him. It cannot have been meant that he should lose his right by bringing into court the amount of the judgment obtained against him, thus doing away with the necessity for execution and saving the expense of issuing it. Sect. 150 cannot be meant to apply only to cross-judgments on a claim and counter-claim in the same action, because the same enactment was in the original County Courts Act of 1846 (9 & 10 Vict. c. 95), s. 93, and counter-claims were not then in existence.

Douglas Hogg replied.

WILLS J. I am of opinion that this appeal should be dismissed. The point raised is a short one, and it has been well and concisely argued by counsel on either side. I do not hesitate to say that the effect of what the Legislature has done is to establish in the county court a different system from that which prevails in the High Court in respect of a solicitor's lien for costs. If that be so, it is only because the Act of Parliament has said that it should be so; and the Act must, of course, be obeyed. Sect. 150 of the County Courts Act, 1888, establishes by very clear language that where there are cross-judgments in the county court, if the person who has obtained judgment for the smaller sum chooses to wait for execution, thereby incurring, as he must, further costs, he can avail himself of the right of setting off the sum for which he has

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Wills J.

obtained judgment against the larger sum for which judgment has been obtained against him. If that right exists, it is quite clear that the only sum for which execution can issue is the balance, because the section provides, not only that execution shall be for the balance, but that satisfaction shall be entered both for the balance and for the smaller sum; and if both sums are equal, satisfaction shall be entered upon both judgments. In view of those provisions, how can it be said that the solicitor's lien for costs is preserved?

Then comes the question, Are we to look at the substance of the enactment, which is that there shall be no enforceable judgment except for the balance against the person who has recovered the smaller sum, or are we to be limited to the very words which deal with execution, and to say that, if the person who has obtained judgment for the smaller sum pays into court the larger sum for which judgment has been obtained against him, so that no execution is necessary, he has lost his right of set-off? I cannot think the Legislature meant that the person who has paid the larger sum into court must incur in respect of having execution issued against him considerably more costs than he has already incurred before he can get the benefit of the statute. If he cannot have an enforceable judgment for the smaller sum which he has himself recovered, I do not think it was meant that he should have an enforceable judgment against him for anything but the balance between that sum and the larger sum which he has paid into court. I think the decision of the county court judge was right. Although s. 150 does not in precise words cover this case, its meaning is that there shall be no available process except for the balance between the larger and the smaller sum. It was suggested that, if this were so, the section must have been passed per incuriam. I doubt that, because the same enactment was contained in the Act of 1846, which established county courts. It was an Act very carefully drawn and considered. At that time the jurisdiction given to the county court was much more limited than it is now. The object was to secure a cheap and speedy administration of the law for the benefit of the poorer classes, and the Court which was estab-

lished by the Act was called in popular parlance "the poor man's Court." I am not sure that the Legislature did not intend to prevent the multiplication of costs in some cases, even though the costs were costs which could be properly incurred. Having regard to the fact that the provisions of s. 150 of the Act of 1888 were in the Act of 1846, when no right of counter-claim existed, I think it is clear that "cross-judgments" must mean cross-judgments in different actions, and not merely cross-judgments where there is a claim and counter-claim in the same action.

KENNEDY J. I am of the same opinion. Sect. 150 would clearly have operated if the defendant, instead of paying the 21*l.* into court, had waited until the plaintiff took out execution. Then the 5*l.* would have had to be deducted, and the balance only could be paid out to the plaintiff. I entirely concur in what my brother Wills has said with respect to the effect of s. 150, and I think that its object would be defeated if we were to give effect to the argument for the appellant. I am of opinion that this appeal should be dismissed.

Appeal dismissed. Leave to appeal.

Solicitor for appellant: *A. E. Cubison.*
Solicitors for respondent: *Corsellis, Mossop & Berney.*

W. A.

C. A.
1904
Jan. 12.

[IN THE COURT OF APPEAL.]

THE ATTORNEY-GENERAL ON THE RELATION OF THE MONMOUTHSHIRE COUNTY COUNCIL AND THE MONMOUTHSHIRE COUNTY COUNCIL *v.* SCOTT.

Highway—Locomotive—Traction Engine—Nuisance—Interim Injunction—Locomotive Act, 1861 (24 *&* 25 *Vict. c.* 70), *s.* 13—*Locomotives Act*, 1898 (61 *&* 62 *Vict. c.* 29), *s.* 6.

In an action by the Attorney-General, on the relation of a county council, for an injunction to restrain the defendant from using a traction engine upon a road in such a way as to cause a public nuisance:—

Held, that nothing in the Locomotives Act, 1898, had affected the prohibition in s. 13 of the Locomotive Act, 1861, against causing a nuisance by the user upon a highway of a locomotive engine; and that it was no answer to an application for an interim injunction that the damage to the road would not have happened but for the neglect of the county council to keep it in a proper state of repair.

APPEAL from an order of Phillimore J.

The action was brought claiming by the writ an injunction to restrain the defendant, his servants or agents, from using or causing or procuring to be used any locomotive, or otherwise conducting any traffic upon a specified highway in the county of Monmouth in such a way as, by damage to or obstruction of the highway, to cause a public nuisance.

After the commencement of the action a summons was taken out at chambers for an injunction in the terms of the writ, and served, by leave of a judge at chambers, upon the defendant with the writ.

Affidavits were filed on behalf of the plaintiffs, and the case made in them was that the defendant hauled stone from two quarries over the highway, which was an old turnpike road; that in doing so he used a traction engine of the weight of about eleven tons and two laden trucks; that the traffic caused thereby was more than an ordinary metalled road could bear; that the road could not be kept in repair while such traffic was carried on; and that the highway had become, on account

of the excessive traffic carried on by the defendant, a nuisance and a source of danger to the public.

The case put forward in the affidavits on behalf of the defendant was in effect that the bad state of the road was owing to the bad way in which the road had been made, and to the fact that it was insufficiently kept and repaired by the plaintiffs, the county council. It appeared that the defendant was the holder of a licence granted by the county council for the use of a locomotive engine within the county, and it was alleged that neither the weight of the engine, nor that of the loaded trucks, was in excess of the weight allowed by s. 4 of the Locomotive Act, 1861, and that the requirements of that section as to trucks hauled over the road had been complied with, that the user of the road was lawful, and that no nuisance had been created.

The summons came before Phillimore J., who granted an interim injunction as prayed, upon the usual undertaking by the county council as to damages.

The defendant appealed.

R. Cunningham Glen, for the defendant. There was evidence of that which may have amounted to extraordinary traffic, but there was no evidence of anything amounting to a nuisance to the highway, and consequently there is no ground for granting an interim injunction. The series of Locomotive Acts from 1861 to 1898 shew that the Legislature contemplate extensive user of the highways by locomotives, and no user that is not shewn to be illegal should be the subject of an interim injunction. The proper course for the county council to take, if they find that injury is being done to the roads by the passing of heavier weights than they will bear, is to make by-laws regulating the traffic, as they may under s. 6 of the Locomotives Act, 1898 (61 & 62 Vict. c. 29). In this case the user by the defendant was not illegal, and the mischief arose from the failure of the council to maintain the road in a proper condition. The duty of the county council is to keep up the road, and, if necessary, to improve it so as to make it equal to the requirements of the traffic using it, and of the industries

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carried on in the neighbourhood—that is, as pointed out by Field J., to repair them up to the existing standard of traffic: *Wallington* v. *Hoskins*. (1) The duty to maintain roads is laid down in the Local Government Act, 1888, s. 11. By not carrying out their duty the council are the authors of the wrong of which they complain, and ought not to be granted the injunction which they seek, especially as the granting of such an injunction is a matter of discretion. It may be pointed out that under the Highways and Locomotives Act, 1878, s. 23, the county council have a complete remedy for any injury that has been done to the road, as they can recover the expenses caused by the traffic. The effect of the Act of 1898 is to provide a complete scheme for dealing with the traffic of locomotives and traction engines whether or not a nuisance is created by the traffic, and to that extent s. 13 of the Locomotive Act, 1861 (24 & 25 Vict. c. 70), has now no operation. [He cited *Gas Light and Coke Co.* v. *Kensington Vestry* (2) and *St. Mary Newington* v. *Jacobs*. (3)]

A. T. Lawrence, K.C. (with him *J. R. Atkin*), for the plaintiffs. This is a proceeding taken in the interest of the public with a view to abating that which is clearly a public nuisance. The question, therefore, whether the road authority has not done its duty or has failed to keep the road up to a certain standard is immaterial. Any one who uses a road has a remedy, if the road is out of order, against the road authority. If a culvert will not bear a heavy weight, and any one, instead of taking steps to enforce its being repaired, takes a heavy weight over it and breaks its down, it could hardly be contended that he would incur no liability; but that is a similar case to the present. The difference between the cases of traction engines and of railway locomotives in the matter of liability for damage is brought out in *Powell* v. *Fall* (4); and in the case of the former there is no immunity from common law liability.

[He was stopped.]

(1) (1880) 6 Q. B. D. 206, at p. 215.
(2) (1885) 15 Q. B. D. 1.
(3) (1871) L. R. 7 Q. B. 47.
(4) (1880) 5 Q. B. D. 597.

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COLLINS M.R. This is an appeal from a decision of Phillimore J. granting an injunction in a suit brought by the Attorney-General (on the relation of the Monmouthshire County Council) and the Monmouthshire County Council as co-plaintiffs for an injunction, which is asked for in the writ in these terms: "An injunction to restrain the defendant, his servants or agents, from using or causing or procuring to be used any locomotive, or otherwise conducting any traffic upon the highway leading from Caldecott to Major, situate in the parish of Llanvihanfel Roggiett, in the county of Monmouth, in such a way as by damage to or obstruction of the said highway to cause a public nuisance"; and the interim injunction has been granted substantially in the terms of the writ. The defendant has appealed, and as far as I understand the grounds of appeal the first of them is that there is no nuisance at common law. That is a matter of evidence and a question of fact, and we have affidavits before us which if true clearly shew a public nuisance, on the ground that the defendant, by the use of traction engines of great weight drawing trucks of considerable weight with heavy loads in them, has turned the road into a condition in which it is dangerous to life by night and day. There is, therefore, primâ facie a nuisance. The second argument for the defendant starts by admitting that the road is in such a condition as to be a nuisance, but seeks to relieve him from the burden of liability on the ground that it was the duty of the local authority to put the road into such a condition as to stand this traffic. The existence of a public nuisance created by the defendant is established; and I cannot agree that it is an answer, in this proceeding by the Attorney-General, to say that the road authority might have put the road in repair. The public are interested in the abatement of the nuisance, and they are represented by the Attorney-General, and it is no answer in such a proceeding to say that if some one else had done his duty the nuisance would not have arisen. It is open to individuals to take steps to make a public authority do its duty, and because no steps are taken that does not give carte blanche to any one to create a nuisance on the highway. It cannot be contended that a person who uses a highway has

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a licence by law to use it in such a way as to make it founderous and a nuisance. Next, the terms of the various Locomotive Acts are relied on, and it is pointed out that the right to use locomotives on a highway is recognised in those Acts. That is true; but s. 13 of the Act of 1861 is in these terms: "Nothing in this Act contained shall authorize any person to use upon a highway a locomotive engine which shall be so constructed or used as to cause a public or private nuisance; and every such person so using such engine shall, notwithstanding this Act, be liable to an indictment or action, as the case may be, where, but for the passing of this Act, such indictment or action could be maintained." Subsequent legislation must be read subject to that provision. The Locomotives Act, 1898, is really the enactment of a series of provisions to mitigate the probable inconvenience of the user of locomotives on highways, but all such provisions are subject to the limitation imposed by s. 13 of the earlier Act. Locomotives cannot be used on highways unless they conform to certain provisions which it is in the power of the authority to prescribe; but a matter is none the less a public nuisance because there has been conformity to the particular regulations for traversing the highway. That is the result of the earlier Act.

Then it is said that the subsequent Act of 1898, giving the power to make by-laws restricting locomotive traffic, has modified the provisions of the earlier Act, and in fact repealed s. 13 of that Act. That contention is at once negatived on looking at the schedule of the later Act, which sets out the extent of the repeal of the Act of 1861, and does not include s. 13. All that this later Act does by s. 6 is to enlarge the special powers of the authority to impose restrictions on locomotive traffic by means of by-laws. The provisions of that Act are not in the slightest degree incompatible with the underlying obligation not to create a nuisance on the highway. For this view there is the authority of this Court in *Powell* v. *Fall* (1), where a distinction is drawn between liability for injuries when done by persons acting under statutory powers and when done by persons merely using their common law

(1) 5 Q. B. D. 597.

rights. The distinction is drawn between the case of a locomotive travelling on a line under statutory powers, where the liability on the person using the locomotive is for negligence only, and the case of a traction engine travelling on a highway in the exercise of a common law right, where there is no immunity with regard to mischief done by the engine. We have in this case a traction engine which has created a nuisance on the highway, and carries with it no immunity from liability for a public nuisance. It seems to me, therefore, that the learned judge was right in granting an interim injunction, which leaves the question open as to what the rights of the parties will turn out to be on an examination of the facts. The appeal must, therefore, be dismissed.

MATHEW L.J. I am of the same opinion. As was pointed out early in the argument, s. 13 of the Act of 1861 is decisive of the matter, because the liability of those who use traction engines on a highway remains the same as their liability at common law. Here there is ample evidence that the traction engine was so used as to create a nuisance, and thereby to render the highway no longer available for other traffic.

A suggestion has been made that the legislation on this subject shews an intention that trade is not to be restrained, and that it is the duty of every road authority to provide for the requirements of each individual carrying on business in the locality. I see no ground for this contention.

Then it is said that s. 13 of the Act of 1861 applied to then existing nuisances, and to those that might arise thereafter up to the passing of the Act of 1898, but that when that Act passed s. 13 of the earlier Act was repealed, because in lieu of the old liability of the person using a traction engine in respect of the creation of a nuisance the county council have obtained powers to make by-laws, which might possibly have all the effect of proceedings at common law in protecting the rights of the public. I can see no reason for adopting that construction of the Act of 1898. To do so would be to nullify the provisions of s. 13 of the earlier Act, and it does not appear that the Legislature had any such intention. In this case the

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interference on the part of the Attorney-General is made on behalf of the public, who are injured by what has been done, and complain that the defendant has rendered the road founderous and committed a public nuisance. I see no answer in such a case to the application for an interim injunction, and I agree that the appeal must be dismissed.

COZENS-HARDY L.J. If I followed the argument for the defendant rightly, the suggestion was that it is not a public nuisance at common law so to use the highway as to make it founderous unless that is done by some wilful or deliberate act. For that proposition there is no authority. It seems to me to be wrong in principle, and moreover it seems to me to be entirely contradicted by the language of s. 13 of the Act of 1861. The final words of that section says: "Nothing in this Act contained shall authorize any person to use upon a highway a locomotive engine which shall be so constructed or used as to cause a public or private nuisance; and every such person so using such engine shall, notwithstanding this Act, be liable to an indictment or action, as the case may be, for such use." It seems to me, therefore, that we start with this—that there may be such user of a highway, although not wilful or malicious; as amounts to a common law nuisance. In this case, is there evidence sufficient to satisfy us on that point? Really, when one examines it, the evidence seems to be ample, and more than ample. I do not wish in any way to forecast what may be the result of the trial when the witnesses are called and subject to cross-examination, but for the purposes of an interim injunction, protected as the interim injunction is by the undertaking to be responsible in damages, I cannot doubt for a moment that the learned judge was perfectly right in saying that there was enough to satisfy him that a public nuisance was created by reason of the user by the defendant of this heavy locomotive and these heavy trucks on this road.

Then it is argued that the Locomotives Act, 1898, has altered the position, and that it justifies that which has been done on the ground that the locomotive and loaded trucks are not in excess of the weight prescribed by the Act of Parliament or

by-laws, and that the number of trucks carried over the road is not greater than is permitted, and that under s. 23 of the Highways and Locomotives Act, 1878, the county council can recover from the defendants any expenses occasioned by extraordinary traffic, or any damage occasioned thereby. I really fail to see how the giving to the road authority a right to recover money in respect of extraordinary user, which might fall far short of a public nuisance, can have any bearing on the right to bring an action or an indictment with the object of abating a public nuisance, and not of putting money into the till of the ratepayers, which is the effect under s. 23.

Then it is said, and this is the last point to which I need call attention, that the county council are themselves at fault —that they are bound at whatever expense to make the roads suitable for heavy traction engines. Whether that be so or not, I desire to express no opinion. If they are liable they are liable to be indicted for not keeping the road in good repair; but that cannot, as it seems to me, make any ground of defence to an action brought by the Attorney-General, as representing the public, in which complaint is made of acts of the defendant which prevent members of the public generally from using this highway as they are entitled to use it.

On all these grounds, the order being framed as it is, and guarded as it is by the undertaking and not preventing the user of locomotives altogether, but only the user in such a way as to create a public nuisance, it seems to me that the order is perfectly right, and that this appeal ought to be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Herbert M. Davis, for H. S. Gustard, Newport, Mon.*

Solicitors for defendant: *Hicks, Davis & Hunt.*

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[IN THE COURT OF APPEAL.]

PRICE & CO. *v.* THE UNION LIGHTERAGE COMPANY.

Carrier—Lighterman—Contract—Exemption from "Loss of Goods which can be covered by Insurance"—Negligence of Carrier's Servants—Liability of Carrier.

Goods were loaded on a barge under a contract for carriage by which the barge owner was exempt from liability "for any loss of or damage to goods which can be covered by insurance." The barge was sunk owing to the negligence of the servants of the barge owner, and the goods were lost. In an action to recover damages for the loss of the goods:—

Held, that, the exemption being in general terms not expressly relating to negligence, the barge owner was not exempt from liability for loss or damage caused by the negligence of his servants.

Judgment of Walton J., [1903] 1 K. B. 750, affirmed.

APPEAL from the judgment of Walton J. in favour of the plaintiffs, in an action tried without a jury, reported [1903] 1 K. B. 750.

The plaintiffs brought this action to recover damages from the defendants for the loss of a quantity of oil which was shipped, at a jetty at Thames Haven, in a barge of the defendants, under a contract by which they agreed to receive the oil and lighter it for the plaintiffs to Belvedere up the river Thames.

There was no written contract for the carriage of the oil, but, by the course of dealing between the parties, the lighterage was subject to the terms of a clause which was printed in the forms of stationery used by the defendants in their business, and was as follows: "The rates charged by us are for conveyance only, and we will not be liable for any loss of or damage to goods which can be covered by insurance. The terms of the marine or other policy should stipulate that insurance is effected without recourse to lighterman." The oil was loaded on the defendants' barge at the jetty, and the barge then remained moored there until after low water. As

the barge rose with the rising tide, the gunwale was caught under a projecting part of the face of the wharf, and the barge was so held down as the tide rose that she sank, and the oil was thereby lost.

Upon the facts of the case the learned judge found that the goods were lost owing to the negligence of the defendants' servants, and judgment was given for the plaintiffs. (1)

The defendants appealed.

Jan. 21. *Carver*, K.C., and *A. M. Talbot* (with them *Loehnis*), for the defendants. No doubt the decisions shew that the shipowner, or other carrier by water, must use unambiguous language in order to relieve himself from liability for damage to the goods carried arising from the negligence of his servants; but it is not necessary that he should do so in express terms. It is sufficient if the words in their ordinary business meaning plainly import that the particular loss is not to be covered. In the present case the terms of the clause import in unambiguous language that the defendants are not to be liable for such a loss as was here occasioned, because such a loss would be covered by a policy of marine insurance in the usual terms. The provision that, in insuring, it should be stipulated that there should be no recourse to lightermen intimates clearly that a loss caused by negligence of the lighterman's servants is contemplated by the exception clause, for cases of such loss would form the principal class of cases in which there would be such recourse. There are certain matters, such as loss by misdelivery or bad storage, which would not be covered by an ordinary marine policy, and as to which therefore the exception clause would not relieve the defendants, but it is clearly stated that everything which would be covered by an ordinary marine policy should be excepted. *Sutton & Co.* v. *Ciceri & Co.* (2) is not applicable, for there was no evidence to shew that the damage was the result of a sea peril.

[They also cited *Phillips* v. *Clark* (3); *Grill* v. *General Iron*

(1) [1903] 1 K. B. 750.
(2) (1890) 15 App. Cas. 144.
(3) (1857) 2 C. B. (N.S.) 156; 26 L. J. (C.P.) 168.

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Screw Collier Co. (1); *Taubman* v. *Pacific Steam Navigation Co.* (2); *Taylor* v. *Liverpool and Great Western Steam Co.* (3); *Burton* v. *English* (4); *Steinman* v. *Angier Line.* (5)]

Hamilton, K.C., and *Bailhache*, for the plaintiffs. There are certain well-established rules of construction with regard to these exception clauses; and, according to those rules, the clause in this case is not so expressed as to free the defendants from liability for the loss which has occurred. It has been frequently laid down that, in order to relieve himself from liability for a loss occasioned by the negligence of his servants, a shipowner must employ clear and unambiguous language. A lighterman is, as regards carriage on the river, a common carrier, and subject to the liabilities of such as an insurer: *Liver Alkali Co.* v. *Johnson.* (6) He has therefore two sorts of liability: his liability as an insurer, and his liability for the acts and negligence of his servants. Primâ facie, in clauses of this kind, it is the more onerous sort of liability, namely, for things which he and his servants cannot help, and not that for things which he or his servants can help, against which he is endeavouring to secure himself by excepting losses which can be covered by insurance. In the case of a common carrier the insurance company would have recourse against the carrier, and therefore any suggested implication from the intimation that the insurance should be without recourse to the lighterman does not arise.

A. M. Talbot, in reply.

LORD ALVERSTONE C.J. I have come to the conclusion that the judgment of the learned judge was right. Since the case of *Phillips* v. *Clark* (7) it has been settled that when a clause in such a contract as this is capable of two constructions, one of which will make it applicable where there is no negligence on the part of the carrier or his servants, and the other will make it applicable where there is such negligence, it

(1) (1866) L. R. 1 C. P. 600; (1868) L. R. 3 C. P. 476.
(2) (1872) 26 L. T. 704.
(3) (1874) L. R. 9 Q. B. 546.
(4) (1883) 12 Q. B. D. 218.
(5) [1891] 1 Q. B. 619.
(6) (1872) L. R. 7 Ex. 267.
(7) (1857) 2 C. B. (N.S.) 156; 26 L. J. (C.P.) 168.

requires special words to make the clause cover non-liability in case of negligence. That is the principle on which Walton J. decided this case, and it can be deduced from the decisions on a variety of expressions dealt with in various cases. It has been applied where the exemption was from loss by "breakage and leakage": *Phillips* v. *Clark* (1); "breakage, leakage, or damage": *Czech* v. *General Steam Navigation Co.* (2); "accidents or damage of the seas": *Grill* v. *General Iron Screw Collier Co.* (3); and "thieves" and other expressions of the kind, as in *Taylor* v. *Liverpool and Great Western Steam Co.* (4) and other cases. There are a number of cases in which the words of a clause of exemption have had to be construed in their ordinary commercial and business sense, and where no other construction could be put upon them, as, for instance, the case of *The Teutonia* (5), though that decision may have hereafter to be considered, where the words were "however occasioned," which were held to include every cause of loss. That consideration does not arise in this case.

We have to consider whether the words "we will not be liable for any loss or damage to goods which can be covered by insurance" bring the case within the class in which the negligence of the carrier or his servants is so clearly referred to that we ought to hold that there is a sufficient statement of an intention to exempt the carrier from liability for negligence.

I may say at once that I think Mr. Carver was right in declining to adopt the suggestion that I made as to the light to be thrown on the clause by the words "without recourse to lighterman," because there are several grounds of liability which would give the underwriter, in the name of the owner of the goods, recourse to the lighterman, quite apart from the question of negligence. One example is perils of the sea or perils of the river for which a common carrier is liable in the absence of express exception. The words "without recourse

(1) 2 C. B. (N.S.) 156; 26 L. J. (C.P.) 168.
(2) (1867) L. R. 3 C. P. 14.
(3) L. R. 3 C. P. 476.
(4) L. R. 9 Q. B. 546.
(5) (1871) L. R. 3 A. & E. 394; (1872) L. R. 4 P. C. 171.

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to lighterman" have therefore a meaning without including a case of negligence.

It is of course quite possible to construe the words "any loss of or damage to goods which can be covered by insurance" as including everything, because practically everything can be so covered, and, as pointed out by Walton J., a great many policies of insurance would include such a loss as that which arose in this case. The question, however, is not whether these words could be made to cover such a loss, but whether in a contract for carriage they include, on a reasonable construction, an exemption from negligence on the part of the carrier. We have only to look at the case to which I have referred, and in particular to *Sutton* v. *Ciceri* (1), to see that the words of this contract can receive a contractual and businesslike construction and have effect without including in the exemption the consequences of the negligence of the carrier. That being so, the principle that to exempt the carrier from liability for the consequences of his negligence there must be words that make it clear that the parties intended that there should be such an exemption is applicable to this case, and the learned judge was right in holding that the contract does not exempt the defendants from liability for their own negligence. I think, therefore, that the appeal should be dismissed.

COLLINS M.R. I am of the same opinion. I have considered my brother Walton's judgment, which seems to me to exhaust the question, and to put the decision of this case upon the right principle, and to state precisely the result of the authorities.

ROMER L.J. concurred.

Appeal dismissed.

Solicitors for plaintiffs: *J. A. & H. E. Farnfield.*
Solicitor for defendants: *C. E. Harvey.*

(1) 15 App. Cas. 144.

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1904
Jan. 22.

In re AN ARBITRATION BETWEEN GOUGH AND THE ASPATRIA, SILLOTH AND DISTRICT JOINT WATER BOARD.

Waterworks—Land compulsorily taken—Compensation—Special adaptability.

Where land is compulsorily taken for the purpose of making a reservoir, the fact that the land has peculiar natural advantages for supplying a district or area, apart from any value created or enhanced by the scheme or Act for appropriating the water to a particular local authority, may be taken into consideration in the assessment of compensation; and it is not necessary that it should be proved that the land could be similarly used by other specified local authorities.

Judgment of Wright J., [1903] 1 K. B. 574, affirmed.

APPEAL from a judgment of Wright J., reported [1903] 1 K. B. 574, upon a question raised in an award stated by an umpire in the form of a special case.

By the Aspatria, Silloth and District Water Act, 1901, the Aspatria, Silloth and District Water Board was constituted for the purpose of constructing the works and taking the waters by the Act authorized, and for supplying water within the districts and parishes therein mentioned, and exercising the powers in the Act contained.

The Water Board served on Miss Gough a notice to treat for certain lands and water therein referred to, of which she was the owner in fee, for the purpose of making a reservoir. The Water Board and Miss Gough having failed to agree as to the amount of compensation to be paid to her for her interest in the said lands and water, arbitrators and an umpire were appointed, and at the request of the parties the umpire stated his award in the form of a special case.

The umpire found (inter alia) that owing to the natural configuration of the lands and water in question they were peculiarly adaptable for the construction of a reservoir. One of the questions for the opinion of the Court was—whether, in estimating the value of the land and easements to be acquired by the Water Board for the reservoir, the natural

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and peculiar adaptability for the construction of a reservoir of the lands in question is or is not a fit and proper matter for consideration as an element in the value thereof in the assessment of compensation.

If the Court should be of opinion that in estimating the value of the land and easements the natural and peculiar adaptability for the construction of a reservoir of the lands in question was not a fit and proper matter for consideration as an element in the assessment of compensation, the umpire reduced the amount of his award by the sum of 1636*l.*

The learned judge answered the question raised by the umpire in the affirmative.

The Water Board appealed.

Balfour Browne, *K.C.*, and *Roskill*, *K.C.*, in support of the appeal. The finding of the umpire is a bare finding that the land is suitable for storing water. Standing alone, mere physical adaptability is not an element to be taken into consideration in awarding compensation. Its existence does not necessarily imply any commercial value. To illustrate this the case of land with an adaptability for the building of a house may be taken. The mere fact that there is such adaptability does not make the land building land. If it were near a town it might have building value, even though it might not be possible at the moment to lay hands on any one who would buy for the purpose of building. The distance from a town might, on the other hand, be so great that the expense of building would be prohibitive, and under such circumstances it would be impossible to say that there was any building value. The commercial value, which is regulated by competition, must exist before any compensation can be given for adaptability to any purpose, whether for a railway, for building, or for a reservoir for water. In the present case this element of competition is wanting, for the special case does not shew that there is any possible purchaser other than the Water Board. If there were populous places requiring the water the case would resemble that of building land near a town, and it would not be contended that compensation

could not be given on the footing of special adaptability; but of this there is no indication whatever.

[LORD ALVERSTONE C.J. Does not the decision in *Riddell* v. *Newcastle and Gateshead Waterworks Co.* (1) shew that your argument restricts the right to compensation too much? The language of Bramwell L.J. in giving judgment amounts to this, that it would be a mistake to omit to consider any additional value which might attach to the land in consequence of its being a suitable site for a reservoir.]

The question in that case was as to the value of the water taken—a matter not before the Court in this case—and the remarks of the Lord Justice were directed to the form of the award. It does not appear by the judgment, but it certainly is very likely, that there was competition in that case for the site as a reservoir, and if so it would not be contended that the arbitrator could not take that fact into consideration. The point in this case is that there is no evidence of a demand for this site as a reservoir by any person or body other than the Water Board, and that the arbitrator under those circumstances cannot entertain the question of adaptability, for that would be to treat the value to the purchasers as an item in assessing compensation to the vendor. That this cannot be done is made clear by the judgments in *Countess Ossalinsky* v. *Corporation of Manchester*. (2) It is there pointed out that it would be a fatal objection to the award that the arbitrator had valued the land with reference to the particular purpose for which it was required, and had awarded the increased value of the land conferred by the special Act. The effect of the judgment may be stated thus: the arbitrator must be convinced that the land has a value for the particular purpose apart from the wants of the particular purchaser and apart

(1) Decided in 1879 on appeal from a judgment of the Queen's Bench Division by the Court of Appeal (Bramwell, Brett, and Cotton L.JJ.). The judgment of that Court is set out at length in Browne and Allan, Law of Compensation, 2nd ed. p. 678. See also F. R. Browne, Law of Compensation, p. 14.

(2) Decided in 1883 in the Queen's Bench Division by Grove and Stephen JJ. The judgment of the Court is set out at length in Browne and Allan, Law of Compensation, 1st ed. p. 718; 2nd ed. p. 659.

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from the Act of Parliament under which it is taken. Even in cases in which the beneficial purpose to which the lands may be applied is to be taken into consideration, there is a limitation, as pointed out by Cockburn C.J. in *Reg.* v. *Brown* (1), that the beneficial purpose must be one that will arise at no remote period. The possibility of a beneficial user must not be remote or a matter of speculation, and in this case, excluding user by the Water Board, it is both.

Sir Ralph Littler, *K.C.*, and *W. G. Clay*, for the claimant, were not called on.

LORD ALVERSTONE C.J. The point that has been raised in this case is of importance; but, as I said in the course of the argument, it is covered by authority, and if it is to be decided in the way suggested by the learned counsel for the Water Board it must be left to the House of Lords to do so. I have often regretted that the case of *Riddell* v. *Newcastle and Gateshead Waterworks* (2) did not find its way into any of the reports, and I am glad that it should now be brought to notice. In this case the umpire has found in his award that owing to the natural configuration of the lands with which he was dealing they are peculiarly adaptable for the construction of a reservoir, and he has estimated the compensation to be paid if this element is one that can properly be taken into consideration, in ariving at the compensation to be paid, at the sum of 1636*l.* It is contended on behalf of the purchasers that the value so arrived at is not a proper subject of compensation. Two grounds are put forward in support of this view—first, that, in the absence of evidence of competition for the site, the purpose of the purchase under statutory powers must be absolutely excluded in arriving at the amount of compensation; and, second, that the umpire has arrived at the sum of 1636*l.* on the supposition that there is or may be some other possible purchaser, and that no evidence was given to that effect. I think that both these points were decided in the case of *Riddell* v. *Newcastle and Gateshead Waterworks*, to which I have already referred. In that case, as in this, a question had been raised

(1) (1867) L. R. 2 Q. B. 630, at p. 631. (2) See note (1), ante.

as to the right to sell water. I was counsel in that case, and when it came before the Court of Appeal I found myself in difficulties as to the question of the sale of water, and I then argued that the arbitrator had excluded from his assessment of compensation the element of the natural adaptability of the site for the purpose of a reservoir. A summary of the judgment of Bramwell L.J. is given in Mr. F. Balfour Browne's Law of Compensation, p. 16. (1) It is as follows: "The arbitrator had awarded the 17,000*l.* as compensation in respect of the lands, tenements, rights, easements, and premises required to be purchased, and it was clear that he included in that all rights in respect of water which might accumulate on the land. The arbitrator then stated that a claim had been made in respect of the water which the company could collect, or divert, and impound by the works. That referred, without doubt, to damage which might happen to other lands of Mr. Riddell by the company intercepting the water that would have flowed to them. If that was the proper construction of the award, it could not be impeached. The counsel for the appellant had attempted to place a different construction on it, but their construction could not be maintained. It was impossible to suppose that an arbitrator, especially one who had so much experience in such matters as Mr. Clutton, could have made the double mistake, first of omitting to consider any additional value which might attach to the land in consequence of its being a suitable site for a reservoir, and then of concealing his mistake by the language of his award." From the shorthand note of the judgment of the Court of Appeal I find that the other members of the Court express the same view. Thus Brett L.J. at the beginning of his judgment said that it was clear that the arbitrator had given compensation for the damage sustained by reason of the execution of the works, and added: "It seems to me clear that that would give the value of the land taking into account its position and all its capabilities for any particular purpose"; and Cotton L.J. said that he could not come to the conclusion that the arbitrator had not taken into consideration

(1) From *The Times* of June 14, 1879.

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all the capabilities of the land, "including any value arising from the fact of its being well watered land, or land available for the purpose of making a reservoir or anything else connected with traffic in water." Throughout the judgments there is not a word about its being necessary to find present customers other than the purchaser under statutory powers. The Court of Appeal refused to send the case back to the arbitrator, and I am satisfied that they meant to decide that the element of value for special adaptibility had been, and had rightly been, taken into consideration by the arbitrator. I think I may add that in consequence of that case I consulted Thesiger L.J., who had great experience in arbitration cases, and he told me that the judgment of the Court of Appeal on this point was in accordance with the practice in compensation cases. I also discussed the matter with three of the most experienced surveyors, who confirmed the view as to the practice of the profession. The case of *Countess Ossalinsky* v. *Corporation of Manchester*, which also is unreported, was an instance of the same rule. There the Queen's Bench Division held that the suitability of the site for the purpose of a reservoir was an element that ought not to be omitted in assessing compensation: as I pointed out in the course of the argument, the question in the present case is one rather of fact than of law. My brother Wright did not add, as has been suggested, anything to the findings of the umpire. He said in giving judgment: "If there is a site which has peculiar advantages for the supply of water to a particular valley or a particular area of any other kind, or to all valleys or areas within a certain distance, if those valleys are what might be called natural customers for water by reason of their populousness and of their situation—if the site has peculiar advantages for supplying in that sense—apart from value created or enhanced by any Act of Parliament or scheme for appropriating the water to a particular local authority, I think it may be taken that there is a natural value in the site for the purposes of water supply, and that it should be taken into consideration"; and he added: "It would be otherwise, no doubt, if there was no natural value in the place as a water site apart from the

particular scheme or Act of Parliament, or, in other words, there is no value for which compensation ought to be given on this head if the value is created or enhanced simply by the Act or by the scheme of the promoters." In my opinion that clearly expresses what is the law on the matter.

The appeal from the judgment of my brother Wright must be dismissed.

COLLINS M.R. I am of the same opinion. It is alleged on behalf of the Water Board that, taking the facts as found by the umpire in his award, it follows as a matter of law that the element of the adaptability of this site for the purposes of a reservoir ought not to be included in assessing compensation. The umpire has included it, and it seems to me that in so doing he has followed the primâ facie presumption that this element of adaptability ought to find a place in the estimate of the amount of compensation. That view is supported by authority and by long practice; but underlying it is the question, which is one of fact for the arbitrator, whether there is a possible market for the site, and in determining that the statutory purchase is not to be considered. To exclude the element of adaptability it would be necessary, as it seems to me, to shew that there is no reasonable possibility of the site coming into the market. The value of the possibility if it exist is a question entirely for the arbitrator.

ROMER L.J. I entirely agree.

Appeal dismissed.

Solicitors for claimant: *Metcalfe, Birkett & Rowlatt, for Mounsey, Bowman & Graham, Carlisle.*

Solicitors for Water Board: *T. R. Hargreaves, for F. Richardson, Aspatria.*

A. M.

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Dec. 17.

CLAYTON AND ANOTHER, APPELLANTS; PEIRSE, RESPONDENT.

Fish—Salmon Fishery—By-law—"Description of Nets"—Salmon Fishery Act, 1873 (36 & 37 *Vict. c.* 71), *s.* 39, *sub-s.* 3.

By s. 39 of the Salmon Fishery Act, 1873, a board of conservators may make by-laws to determine (inter alia) "the length, size, and description of nets . . . . for taking salmon":—

Held, that a by-law made under this section which prohibited the use of particular kinds of nets was not ultra vires, since the word "description" did not limit the board of conservators to making regulations as to the characteristics of the particular kinds of nets.

CASE stated by justices.

An information was prepared by the respondent under a by-law made by the Board of Conservators for the Wye Fishery District, pursuant to the Salmon and Freshwater Fisheries Acts, 1861 to 1892, against the appellants, who were fishermen, for that they on May 13, 1903, in the parish of Goodrich, in the county of Hereford, and in that part of the river Wye which lies above a line drawn across the river along the lower side of Bigsweir Bridge (being within the Wye Fishery District), did unlawfully use a net other than a beating net—to wit, a draft or seine net for taking salmon contrary to the by-law.

By the by-laws which were made on November 27, 1901, and confirmed by the Board of Trade on February 27, 1902, regulations were made for fishing in the Wye Fishery District.

By-law No. 2, which was the by-law in question, was as follows:—

"2. The length, size, and description of nets and the manner of using the same . . . . which may be lawfully used for taking salmon in the Wye Fishery District shall be as follows:—

"(*a*) In that part of the said district which includes so much of the river Wye as lies below a line drawn across the said river Wye along the lower side of Bigsweir Bridge . . . .

the description of such nets shall be draft or seine nets, beating nets, and lave nets as hereinafter determined."

[The by-law then proceeded to define these particular nets and their mode of use, and continued:—]

"(*b*) In all other parts of the said district, except as aforesaid, and until the 16th day of August, 1906, inclusive, the description of such nets shall be beating nets as above described to be used in manner above mentioned."

By the scale of licence duties attached to the by-laws, the duty for every draft or seine net was fixed at 5*l*., and for each and every beating net at 20*l*.

On the hearing of the information it was proved that the appellants on May 13, 1903, were the servants of the lessee of the Huntsham Salmon Fishery, which was a riparian fishery, and that they were on the occasion in question using a draft or seine net within that fishery, which was within the fishery district and above Bigsweir Bridge, and that the lessee of the fishery held a licence to use a draft or seine net, for which licence he had paid 5*l*. The justices convicted the appellants, but stated this case on the question whether the by-law was or was not ultra vires. (1)

Robson, K.C. (*John Lloyd* with him), for the appellants. This was a riparian fishery, and the effect of the by-law is practically to prohibit fishing with a net in it altogether.

The by-law is ultra vires, as it purports to be made under s. 39, sub-s. 3, of the Salmon Fishery Act, 1873. This only gives the conservators power to regulate the length, size and

(1) By the Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 39 . . . . "a board of conservators may make by-laws for the better execution of the Salmon Fishery Acts, 1861 to 1873 . . . . for all or any of the following purposes—that is to say . . . ."

"(3.) To determine the length, size, and description of nets and the manner of using the same . . . . for taking salmon, provided that no by-law made under the authority of this section shall limit the length of a hang net or limit the length of a draft net so as to be less than 200 yards . . . ."

"(8) To prohibit the use of nets within a certain distance of the mouth of any river and of the point of confluence of rivers in any part of the district (not being a several fishery) . . . ."

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description of nets, and does not allow them to prohibit the use of any particular kind of net. "Description" relates to the characteristics of the net, such as the size of mesh. This is shewn by the proviso to sub-s. 3, which deals with the description of nets, and not with nets generically. If there was power under sub-s. 3 to make a by-law prohibiting the use of any kind of net, there would be no need for sub-s. 8, which allows the prohibition of nets within a certain distance of the mouth of a river; but even that sub-section does not apply to a several fishery such as this was. To say that only a beating net shall be used is oppressive, as the licence for a beating net costs 20*l.*, while that for a draft net only costs 5*l.*

W. Denman Benson, for the respondent. The by-law is intra vires, and was only confirmed by the Board of Trade after a full inquiry, at which the appellants appeared and were heard. "Description of net" includes "kind of net," and the conservators have power under s. 39, sub-s. 3, to say that any particular kind of net shall not be used in any part of the river.

Robson, K.C., replied.

LORD ALVERSTONE C.J. We are asked to say that a certain by-law made under the Salmon Fishery Act of 1873 is ultra vires and unreasonable. As was said in *Kruse* v. *Johnson* (1), a strong case is needed to induce the Court to hold such by-laws void for unreasonableness. Where clear powers are given by the enabling Act of Parliament, we ought not to hold that a by-law made under those powers is ultra vires unless it prescribes something which is clearly not within the statute, and that is certainly even more the case where the by-law is passed (as was the case here) after a public inquiry, at which all the persons interested in the question might have been heard.

It is plain here that the conservators had power to make regulations determining the "length, size, and description" of the nets to be used in the river, and also that they might apply these by-laws to any part of their fishery district (s. 40).

(1) [1898] 2 Q. B. 91.

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What they have done is to say that for a certain limited distance certain nets may be used, but that above that and higher up the river only a beating net can be used. Their right to say so depends on whether they have the right to say that as regards the whole river persons may not use a particular kind of net for fishing. It is contended that such a power is not given them by the words in sub-s. 8 of s. 39, "description of nets and the manner of using the same." In other words, it is said that they cannot prohibit the use of a particular kind of net, but only the length, size, or make of such a net. It would, I think, lead to absurdity, and would unduly restrict the powers of the conservators, to say that the word "description" in that sub-section only means description of a particular kind of net, such, for instance, as a beating net or draft net, and that it does not enable the conservators to prohibit the use of that kind of net altogether. In my opinion the word "description" means kind as comparing one kind with another, and I think that the proviso to the sub-section rather supports that view, because it regulates the limitations of two particular kinds of nets. Such a proviso, to a section enabling regulations to be made as to the description of nets, certainly suggests that a draft net or a hang net may be a description of net within the section. That perhaps does not carry the matter much further, but I am clearly of opinion that it would be cutting down the powers of the conservators unduly to say that the Act did not allow them to prohibit the use of a particular kind of net altogether. But it is urged that this cannot be the meaning of sub-s. 3, because sub-s. 8 enables the conservators to prohibit the use of nets altogether except in a several fishery. But s. 39, sub-s. 3, and s. 40 give the conservators clear power to deal with the control of nets in all parts of the river, and their powers, therefore, are intended to be extensive. I think the language of s. 39, sub-s. 3, ought to be construed as conferring upon them power to make the by-law in question.

Then it is said that to hold the by-law to be intra vires is practically to prohibit fishing in this fishery altogether, because the payment for a licence to use a beating net is four

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times as great as that for a draft net. The licence duties depend on the power given by the 3rd schedule to the Act of 1873, and there is ample provision in s. 41 of that Act for enabling persons whose interests are at stake to bring forward their objections to any of the provisions of the by-laws before they are confirmed. It seems to me quite hopeless to argue that this by-law is ultra vires because it prescribes the use of a net for which a duty of 20*l.* is payable, and forbids the use of another for which only 5*l.* is payable.

In my opinion this conviction must be affirmed.

LAWRANCE J. I agree.

KENNEDY J. It is plain that if this by-law is not ultra vires it must be a by-law properly made under the powers given by the various sub-sections of s. 39 of the Salmon Fishery Act, 1873. It is contended that the word "description" in sub-s. 3 only refers to the characteristics of the different sorts of nets, and that it does not enable the conservators to prohibit the use of any particular sort of net altogether. It seems to me that there is no reason why the word "description" should not be held to cover the generic description of nets as well as particular characteristics of those nets. The conservators may say, as I think, that a net of a certain description, such as a draft net or a beating net, shall not be used, or they may say that the description of a draft net or beating net shall be so and so, indicating its particular characteristics. I think that there is no reason in limiting the word "description" to the description of the characteristics of the net. For all practical purposes it must be conceded that it would be possible by prescribing the characteristics of a particular kind of net to make it of different degrees of efficacy, and therefore by a by-law made under sub-s. 3 of s. 39, it would be possible by setting out the characteristics of a net which should be forbidden to exclude the use of a particular kind of net altogether. In other words, according to the argument for the appellants, the conservators have power to forbid the use of a net described by the enumeration of its points,

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but have not power to exclude its use if they merely called it by its name as a draft net or a beating net. The argument, therefore, leads to the fallacy that the by-law would be good if the net had been described without naming it, but is bad because it names without describing it.

As to the alleged inconsistency between sub-s. 3 and sub-s. 8, it is difficult to see why sub-s. 8 should not be added, for there is no conflict between it and sub-s. 3. I do not think that the mere adding of the powers given by sub-s. 8 makes a by-law made under sub-s. 3 ultra vires. Further, sub-s. 8 allows the prohibition of all kinds of nets within a certain distance of the mouth of the river, and I do not see how that in any way limits the powers given to the conservators by sub-s. 3. The appeal must therefore be dismissed.

Appeal dismissed.

Solicitors for appellants: *Robson, Meredith & Co., for Wallis, Hereford.*

Solicitor for respondent: *R. J. Owen, Builth.*

A. P. P. K.

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Dec. 17, 21.

RAVEN AND OTHERS *v.* THE JUSTICES OF SOUTHAMPTON.

Licensing Acts—Licence—Renewal—Discretion of Justices—Many Public-houses in Locality—Selection of particular House, and Refusal to renew Licence.

On appeal to quarter sessions against the refusal of a licence a map of the locality was produced, and it was proved that within a short distance of the house in question there were a very large number of licensed houses. No notice of objection had been served on any of these houses; but notice of objection had been served on the house in question by the direction of the borough justices, the ground of objection being that the licence was not required in the locality. The house had been a fully licensed house for ten years, and the character of the locality had not altered except that the population had increased. No further evidence was adduced by the respondents:—

Held, by Lord Alverstone C.J. and Lawrance J. (Kennedy J. dissenting), that this evidence did not entitle the quarter sessions to refuse to renew the licence.

CASE stated by a Court of quarter sessions.

The appellants, who were the owners and occupiers of a fully licensed public-house known as the George and Henry, in the borough of Southampton, appealed to the quarter sessions against the refusal by the borough justices to renew the licence, on the ground that the licence was not required in the locality and neighbourhood. The notice of objection was served by direction of the borough justices, and only contained this ground of objection.

At the hearing of the appeal by the quarter sessions a map of the locality was produced, and it was proved by the assistant borough surveyor that, taking the licensed house in question as the centre of a circle, there were within a radius of 100 yards two fully licensed houses and seventeen beerhouses, within a radius of 200 yards twelve fully licensed houses and thirty-seven beerhouses, and within a radius of 300 yards twenty-five fully licensed houses and forty-seven beerhouses.

No notice of objection had been served upon any of these licensed houses or beerhouses. The witness who produced the map also proved that for at least ten years during which he had

known the neighbourhood, which was very thickly populated, the George and Henry had been a fully licensed house, and the character of the locality had not altered except that the population had increased.

A detective officer in the borough police corroborated this evidence, and proved that the neighbourhood was troublesome to the police.

No further evidence was adduced on behalf of the respondents.

It was contended for the appellants that although the map and facts proved as aforesaid might be some evidence that there were too many licensed houses in the locality, yet there was nothing to indicate that the George and Henry was a licensed house which was not required, and that there was no evidence that the licence was not required in the locality.

For the respondents it was contended that the map and facts proved as aforesaid were evidence which would support a finding that the licence was not required, and that although the evidence did not differentiate the George and Henry from the other licensed houses in the neighbourhood, yet if it was necessary so to differentiate it, weight should be given to the fact that the notice of objection had been served by direction of the respondents, who had local knowledge, and could therefore differentiate, and had in fact differentiated, between the licensed houses.

The Court of quarter sessions upheld the contention of the respondents, and found that the George and Henry licensed house was not required for the wants of the neighbourhood.

They accordingly dismissed the appeal, but stated this case for the opinion of the Court.

Avory, K.C. (*Temple Cooke* and *S. H. Emanuel* with him), for the appellants. The justices were wrong. There was no evidence on which they could find that the licence of the George and Henry ought to be refused. The utmost that the evidence came to was that there were too many public-houses in the district; but there was no evidence to enable them to pick out the particular house as being the one that was not required. It is an implication of law that a licence will be

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renewed unless there is some ground for refusing to do so: *Sharp* v. *Wakefield* (1); and its renewal can only be refused on some ground personal to the applicant: Licensing Act, 1874, s. 26. Here the objection was to all the public-houses, and not to the particular public-house, and there was, therefore, no evidence on which the quarter sessions could refuse to renew the licence: *Evans* v. *Conway Justices* (2); *Rex* v. *Howard.* (3)

C. T. Giles (*Bassett* with him), for the respondents. The justices are entitled to use their local knowledge, and the fact that the notice of objection to this particular house had been given by their directions is in itself evidence differentiating the house from the others in the neighbourhood, even if it was necessary to differentiate it. There was the strongest evidence that there were too many licensed houses in the neighbourhood, and the fact that the licensing justices had refused to renew the licence of this particular house was sufficient to justify the quarter sessions in refusing to renew it.

Avory, K.C., replied.

Cur. adv. vult.

Dec. 21. KENNEDY J. In this case I have been asked to deliver my own judgment first, as I have the great misfortune to differ from my Lord and my brother Lawrance as to the result of the application. I need not say that in delivering this judgment with the consciousness that I have the misfortune not to have their concurrence, I feel the greatest doubt as to the correctness of my own view; but I feel also that, having formed a different opinion, I ought to give my reasons fully.

In this case the Court of quarter sessions have affirmed the refusal of the respondents to grant the renewal of the licence to the George and Henry public-house in Orchard Lane, Southampton. George Raven is the tenant; Crawley & Co. are the owners of this house. The ground of objection was that the licence was not required in the locality and neighbourhood. On the hearing of the appeal the respondents, according

(1) [1891] A. C. 173. (2) [1900] 2 Q. B. 224.
(3) [1902] 2 K. B. 363.

to the proper and universal practice on the hearing of such an appeal, began. They called William Henry Killick, the assistant borough surveyor, and John Neish, a detective in the borough police. Killick proved that if the George and Henry were taken as the centre of a circle of 100 yards radius, there were within that circle two fully licensed houses and seventeen beerhouses; and if the circle were enlarged so as to have a radius of 300 yards there would be included within it no less than twenty-five fully licensed houses and forty-seven beerhouses. The same witness stated that no notice of objection had been served in regard of any of these other houses; that the neighbourhood was thickly peopled; and that the character of the people had remained the same, while its numbers had increased in the course of the last ten years, during the whole of which period the appellant Raven had held a licence. The witness produced an Ordnance map to illustrate his figures and distances, and to shew the site both of the George and Henry and of all the other licensed houses within the area to which his evidence related by means of marks and circles drawn upon the map. The witness Neish corroborated Killick, and further testified that the neighbourhood was a troublesome one to the police. The appellants thereupon called witnesses, but neither their names nor the nature of their evidence appear in the case. The Court, as appears on the face of the order, after hearing the evidence and the arguments of counsel on both sides, affirmed the decision of the licensing justices and refused the renewal of the licence, subject to the opinion of this Court upon the point intended to be raised by the statement of this special case. The point is, in substance, that the quarter sessions had not any evidence before them to support their finding that the licence of the George and Henry was not required in the locality and neighbourhood. If there was such evidence, of course we cannot overrule their decision.

Now what was the evidence? It was evidence of the locality of the George and Henry. It was evidence also of a large superfluity of licensed houses within the area. The position of each of those houses was before them. The position of the

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George and Henry in relation both to these houses and to the neighbourhood was before them. In my judgment it is impossible to say that these facts did not afford any evidence which legally entitled the Court of quarter sessions to affirm the decision of the licensing justices and to refuse to renew this licence. As I understand the effect of the judgment of the House of Lords in *Sharp* v. *Wakefield* (1), both justices at the licensing meeting, dealing, of course, with each case as it arises upon its merits and exercising their discretion, but exercising it, as Lord Halsbury L.C. pointed out, judicially, and also the Court of quarter sessions on appeal, exercising also, of course, its discretion judicially, and as it must be held since the decision of the Court of Appeal in *Evans* v. *Conway Justices* (2) upon legal evidence, are entitled to refuse to renew a licence if they are of opinion that the public-house to which it relates is not required for the wants of the neighbourhood. To my mind it seems clear that the sworn evidence in the present case permits an inference to be drawn from the position of this public-house in relation both to the neighbourhood and to the other public-houses, and might be held by the tribunal to establish the necessary point, unless—and this is the gist of the appellant's contention—it is not merely relevant but absolutely essential to the proof that it must be further shewn that there are some better grounds for refusing the renewal of the licence to the house objected to than could be shewn to exist in regard to the licence of any other house within the neighbourhood under consideration—as, for example, in respect to convenience of site or character, or the extent of business done. I may say in passing that there was evidence which the justices had before them on the map which illustrated the evidence of Killick as to the relative convenience of sites in this case. The argument of the appellants comes to this: given a locality in which the licensing authority, whether in the first instance or on appeal, is satisfied by proper evidence that there is a needless multitude of licensed houses, the case for the objection to the renewal of some particular licence must be held to fail unless it is established by affirmative evidence

(1) [1891] A. C. 173. (2) [1900] 2 Q. B. 224.

that the licence objected to less deserves renewal than the licence of any other of the public-houses which are situate in the same locality.

Now, speaking for myself, I know of no authority either in the licensing statutes or any reported case which can properly be cited in support of this argument. On the contrary, as I have already said, the law as I understand it accepts as justification for the refusal to renew a licence the fact that, in the opinion of the magistrates, exercising a judicial discretion, and exercising it, of course, in regard to the particular case, or on appeal in the opinion of the Court of quarter sessions, if that opinion is based on legal evidence, the renewal of the licence is not required by the locality. It may, I think, properly also be borne in mind in considering the appellants' arguments: firstly, that to attempt really and satisfactorily to compare upon legal evidence the relative claims to continuance of some sixty to seventy licensed houses which are not objected to as against the one house objected to would plainly involve a long and most difficult, and probably in most cases an impracticable, inquiry; and, secondly, that in the present case direct evidence was adduced in support of the objection that the wants of the neighbourhood were over-supplied. It would, in my humble judgment, be more natural and more fair that the burden of counterbalancing the weight of this evidence by shewing that the particular public-house is more useful to the locality or less superfluous than all or some of the other licensed houses, should lie upon the applicant for the renewal of the licence. In the present case the appellants either did not try to prove, or, if they tried, the result shews they did not succeed in proving, any of these matters on their own behalf. The learned counsel for the appellants dwelt upon the hardship to them of not renewing a licence without evidence of its uselessness or inconvenience as compared with the other licensed houses in the locality which was under consideration. I agree that unless all the houses are compared in evidence it is possible that what might not unreasonably be deemed a hardship may arise as between the applicant for the licence of the George and Henry and the holders of the licences of other houses

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within the area. But no Court can rightly be swayed by the possibility of resulting hardship if the law is clear. The amendment of the law is the duty of the Legislature. It may be deemed a hardship that the renewal of a licence should, under any circumstances whatever, be refused except upon the ground of the bad character of the applicant, or the bad management or insufficient character of the premises. The one duty of all Courts is to administer justly the law as it stands; and in my view it is to be borne in mind, when one ponders the appellants' contention, that the main object of the proceedings in such a case as the present is not the adjudication of merits between a number of public-houses, but the adjudication as to the propriety of the refusal of a licence to a particular house; in regard, of course, to its merits if evidence as to merits is given, but also to the requirements of the neighbourhood. The thing to be decided is whether or not that public-house, owing to the advantages of its situation or to its accommodation or grade, ought to keep its licence in view of the wants of the area in which there are a number of other public-houses. I do not mean to suggest that in coming to a decision the Court of quarter sessions may not rightly give heed to such considerations, as the length of time during which a licence has been yearly renewed, or to evidence of the relative superiority of the particular public-house in any respect as compared with other public-houses in the same locality. But in dealing with the appellants' contention here, which is that certain evidence is not merely relevant but indispensable before a renewal can be legally refused, it appears to me to be important accurately to comprehend the nature of that which is the real and essential issue.

The only other matter, I think, that calls for notice is contained in paragraph 5 of the special case. That paragraph runs thus: "It was contended on behalf of the respondents that the map and facts there proved as aforesaid were evidence on which we could find, and were evidence to support a finding, that the said licence was not required as aforesaid; and although such evidence did not differentiate the said George and Henry from the other licensed houses in the neighbour-

hood, yet, if it were necessary so to differentiate it, weight should be given to the fact that the said notice of objection had been served so as aforesaid by direction of the respondents, who had local knowledge, and could, therefore, differentiate, and had in fact differentiated, between the said licensed houses." As I read that paragraph, it means that the appellants contended that before dealing with this licence its position in relation to the neighbourhood and in relation to all the other public-houses referred to in the very narrow area in which they are so crowded together must be shewn, and that evidence must be given to make the case of renewal less desirable in this case as compared with all those other public-houses. And, as I understand it (and I dwell upon this because I think that my Lord and my brother Lawrance take a different view), I think that the justices held that they had sufficient evidence, and did not agree with the contention of the appellants that it was necessary to differentiate the George and Henry in this way, but that, if it was necessary so to differentiate it, they thought that they were entitled to look at and consider the fact of the notice of objection having been served by the direction of the local justices. The judgment of the Court of Appeal in *Evans* v. *Conway Justices* (1), to which I have already referred, and by which it was decided that the Court of quarter sessions are not entitled to refuse a licence without some evidence to ground the objection, decided also in my view inferentially that the tribunal ought to proceed as a Court of law with regard to the reception of evidence and the requirements of proof. Therefore, although to some extent the proceeding before it is not an ordinary litigation, and it may perhaps be held to partake of the nature, in the words of Channell J. in his judgment in the Divisional Court in the same case, of an administrative tribunal, I feel considerable doubt whether the Court of quarter sessions in this case might consider as to the differentiation of the George and Henry from other public-houses in the same locality the fact that the objection in this case was served by the direction of the justices, who, as the Master of the Rolls said in the case of

(1) [1900] 2 Q. B. 224.

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Rex v. *Howard* (1), are persons deliberately appointed, because from their circumstances they are likely to have local knowledge. In the view which I have already expressed, that the quarter sessions were entitled to decide as they did, upon the evidence before them, without evidence except as to position to differentiate between the George and Henry and the other public-houses, it is not necessary to decide this point. I will, therefore, only say that I am inclined to think that while the origin of the objection to the renewal of the licence could not be treated as by itself affording evidence that the George and Henry was, as between itself and the other public-houses, the one that could best be dispensed with in reference to the wants of the neighbourhood, it does not necessarily follow that the Court of quarter sessions would be obliged, when considering a point taken by the appellants as to the absence of evidence of the comparative merit of the public-houses, wholly to shut out from their consideration in reference to the weight of that argument the fact that the objection to this renewal did not come from a private or irresponsible objector.

LAWRANCE J. Having arrived at a conclusion contrary to that of my brother Kennedy, I will state very shortly the grounds which lead up to that conclusion.

I think that the magistrates had not before them any evidence which justified them in acting as they did in this case. It seems to me impossible to read paragraph 3 without seeing that the evidence of the detective and the other witness who was called added nothing whatever to the facts that were already known to the justices with regard to the number of public-houses in the locality. Those witnesses, one might almost say, proved the map and nothing else. The map shews that there was an enormous quantity of public-houses in this district, two within 100 yards of this house fully licensed and twelve within 200 yards, and it seems to me that upon that the magistrates acted without having any direct evidence as to the licence of the George and Henry public-house. The magistrates are bound to act judicially in the matter. I cannot see how it can be said that they acted judicially if they have merely

(1) [1902] 2 K. B. 363.

taken a primâ facie case. No doubt any one taking up that map would be justified in saying that there were too many public-houses in the neighbourhood; but then comes the question, What is the proper way of dealing with the matter? I do not think they have any right to take the map by itself, and to decide upon the map to take away the licence of any particular public-house.

The magistrates have decided to take away the licence of this public-house, against which, as far as I know, not a word was to be said. If there had been, there would have been evidence forthcoming from the two witnesses who were called; but they have taken that public-house alone, and, without any more evidence than the fact that there are two more public-houses close to it and twelve within a very short distance of it, they deprive it of a licence.

Now the question is, Is that acting judicially? It is impossible, of course, to lay down any rule as to what may be done; but it certainly does appear to me that the case of *Rex* v. *Howard* (1) does shew what might be done, and what, I should have thought, in the interests of justice ought to be done, in cases of this kind. What the magistrates did there was this: They formed a committee of their own members, who did inquire into the respective merits of the different public-houses in the district. They made a report to the justices, and the justices, acting on that, objected to the renewal of all the licences, and gave notice to the licence-holders accordingly. Then, having got the licence-holders before them, they heard evidence in each case, and they were held by the Court to have acted rightly in doing so. The words of the Master of the Rolls seem to me most important in that view (2): "They were of opinion that the only fair and satisfactory way of dealing with the question was to cause objections to be served on all the owners of licensed houses, so that the case of each of them might be formally inquired into, and for this purpose authority was given to the justices' clerk to object to such renewals on the general ground that the houses were not required, and also on special grounds set out in the notice." That gave everybody

(1) [1902] 2 K. B. 363. (2) [1902] 2 K. B. at p. 372.

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their opportunity. It gave the magistrates the opportunity of weighing the merits, or, in other words, acting judicially in the matter, seeing which of the public-houses could remain and from which licences should be taken. That is a proceeding that might have been taken in this case, and it seems to me a reasonable and proper step to be taken in cases of the kind. Nothing of that kind was done here. All that was done was to act upon the map, taking the map alone, and acting upon the fact that there were an enormous quantity of public-houses in the neighbourhood, and that it was necessary to begin with one of them. That being so, I think that the justices did not act judicially in the matter, and that they did not hear the case of this public-house on the merits at all, but merely paid regard to the fact that it formed one of a large number of public-houses.

For that reason I come to the conclusion that the appeal should be allowed. I should be very sorry to say one word to tie the hands of justices who are interested in the good work of putting an end to public-houses in overcrowded districts. That is quite a different matter. I think that justices must have before them some evidence as to the particular public-house on which they could act, and it is only fair to the owners of that public-house that they should have some such evidence.

LORD ALVERSTONE C.J. I agree with the judgment of my brother Lawrance; but as the matter is of very great importance in view of what is now being said with regard to licences, I think it better to state my reasons. I do not differ in substance from the view of the law which my brother Kennedy has so clearly expressed. Where we part company is in the application of that law to this particular case, and I think it well to state one or two preliminary matters that I assume for the purpose of this judgment.

I recognise that the justices may of their own motion give notice that a licence will be objected to on the ground that a particular licence is not required for this locality. That matter was very much discussed in the *Farnham Case*. (1)

(1) *Rex* v. *Howard*, [1902] 2 K. B. 363.

We held, and the Court of Appeal affirmed the view, that that course might be taken, but it must, of course, be remembered in this particular case that the justices only are respondents to this appeal. I further desire to point out that it by no means follows that it is necessary to differentiate between different houses because the justices are going to refuse, or think they ought to refuse, a particular licence on the ground that the licence is not required. There may be circumstances in connection with the character of the house, with its position or accommodation, which would justify the magistrates in thinking that that house, having regard to all its circumstances, is not required in the neighbourhood, and they may act accordingly. We have to consider whether or not the Court of quarter sessions in this case acted as a Court upon evidence that they could lawfully receive, having regard to the objection that was raised by the justices: "That the licence is not required in the locality or neighbourhood." I presume that the quarter sessions have stated the whole case. If they have not done so, I may be doing injustice to them; but that is their own fault, because they have stated the case on which our opinion is asked, and I must assume that they have given us all the evidence on which they acted. It has been suggested there was other evidence. All I can say is that the quarter sessions ought not to have stated a case for us and asked our opinion unless that case was stated having regard to the whole of the evidence, and that is why I wish to read the paragraph of the special case: "Upon the said hearing the following evidence was adduced before us by the respondents: William Henry Killick, the assistant surveyor of the county borough aforesaid, produced an Ordnance survey map (which is annexed to and is intended to form part of this case) of the locality and neighbourhood of the said George and Henry, upon which map he had marked in colour all the fully licensed houses and beerhouses, and proved that, taking the said George and Henry as the centre of a circle of 100 yards radius, there are within the said circle two fully licensed houses and seventeen beerhouses; with the same centre and 200 yards radius there are within this limit twelve fully licensed houses and thirty-seven beerhouses; with the same centre and

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300 yards as radius there are within this limit twenty-five fully licensed houses and forty-seven beerhouses; and that no notice of objection had been served upon any of the said houses or beerhouses prior or subsequent to the annual licensing meeting. That for at least ten years he had known the said locality and neighbourhood, which was very thickly populated, and during the whole of that time the George and Henry had been a fully licensed house, and that the character of the said locality and neighbourhood had not altered except that the population had increased. John Neish, a detective in the said county borough police, corroborated the evidence given by the said William Henry Killick, and in addition stated that the neighbourhood was a troublesome one to the police; and no further evidence was adduced by the respondents." Now I take it as the basis of my judgment that it is on that evidence, and on that evidence only, that the Court affirmed the decision of the justices not to renew this licence. I do not think it is unfair to say, as my brother Lawrance has said, that all that that evidence amounted to is the map, and nothing else. It shewed no peculiarities of the particular house, and it did not even shew the surrounding circumstances of the locality of the particular house, its accommodation, or anything to do with it. It was nothing but the map, and I think that it is not unimportant to point out that the map itself shews that immediately opposite the George and Henry and in the same street stands another fully licensed house. I mention that, not for the purpose of shewing that it was necessary for the justices to differentiate that house from the George and Henry, but in order to point out that if they acted upon the map only, as I think they did, it is not very easy to see how, in the absence of any evidence about the appellant's house, they could avoid differentiating. I wish to enforce what has been laid down by the Master of the Rolls in the case of *Rex* v. *Howard*. (1) I accept it as binding on me and as indicating what is the fair thing to be done in such a case. In that case, which was more difficult than this, there were a great many houses involved, and the Master of the Rolls says this (2): "It is clear from their report that they "—that is the justices—" were of opinion that

(1) [1902] 2 K. B. 363. (2) [1902] 2 K. B. at p. 372.

the only fair and satisfactory way of dealing with the question was to cause objections to be served on all the owners of licensed houses, so that the case of each of them might be formally inquired into, and for this purpose authority was given to the justices' clerk to object to such renewals on the general ground that the houses were not required, and also on special grounds set out in the notice. These objections were signed by the clerk, stating that he was acting under the instructions of the justices present at the annual licensing meeting." All I point out is that in a case much more complicated than this the Master of the Rolls at any rate considers that the fair method would be to serve notice of objection on all the licensed houses. I mention that only for the purpose of shewing that, in the absence of circumstances relating to any particular houses, differentiation (or rather comparison) may be the only means of fairly dealing with such a question; but I wish again to point out that I do not consider any comparison and differentiation is necessary where there is evidence as to the character of the house in respect of which the licence is refused.

Now that being so, I come to the conclusion—and this is where my brother Kennedy and I differ—that the Court of quarter sessions had no evidence before it except the map, and if they did not rely upon the differentiation as contended for by the respondents, they had no evidence on which they could act. I think it is a very serious thing to lay down a rule that justices at quarter sessions may act on that which is not evidence in a Court of law. There was therefore, in my opinion, no evidence before the justices on which they could properly decide that this house was not required for that neighbourhood, and the appeal ought to be allowed.

Appeal allowed.

Solicitors for appellants: *Speechly, Mumford & Co., for Lamport, Bassitt & Hiscock, Southampton.*

Solicitors for respondents: *Barlow & Barlow, for Bassett, Southampton.*

A. P. P. K.

1904
Jan. 12.

DIXON *v.* BRADFORD AND DISTRICT RAILWAY SERVANTS' COAL SUPPLY SOCIETY.

Landlord and Tenant—Notice to quit—Tenancy at Yearly Rent—Three Months' Notice—Expiration of Notice.

By an agreement of tenancy premises were let "at an inclusive rental of 25*l.* per annum from October 1; the tenant to pay rates and taxes in addition; three months' notice on either side to terminate this agreement":—

Held, that this agreement created a yearly tenancy determinable by three months' notice expiring with a year of the tenancy and not at any other time.

Appeal of the plaintiff from a decision of the judge of the Bradford County Court.

The plaintiff claimed 6*l.* 5*s.* for one quarter's rent of premises at Bradford to March 31, 1903. The premises were let by the plaintiff to the defendants under a written agreement, dated September 14, 1894, in these terms: "The Bradford, &c., Society to have the tenancy of house and shop . . . . at an inclusive rental of 25*l.* per annum from October 1st, 1894. The company to pay rates and taxes in addition. Three months' notice on either side to terminate this agreement." On September 24, 1902, notice was given to the plaintiff on behalf of the defendants as follows: "I beg to give you three months' notice that we shall cease the tenancy" of the said premises.

The defendants went out of possession of the premises before the end of 1902. The rent had always been paid quarterly, and the plaintiff demanded rent for the quarter ending March 31, 1903, contending that the tenancy had not been determined. The county court judge held that the tenancy had been duly determined, and gave judgment for the defendants. The plaintiff appealed.

E. J. Naldrett, for the appellant. The proper construction of this agreement is that a three months' notice is substituted for the half-year's notice required by law to terminate a yearly

tenancy, but that it must be a notice to expire with a year of the tenancy in the same way as a half-year's notice. This was a yearly tenancy, and the notice to quit must expire with a year of the tenancy: *Doe* v. *Donovan.* (1) The case of *Kemp* v. *Derrett* (2) is clearly distinguishable, for the words in that case were, "tenant is always to be subject to quit at three months' notice," and there was nothing to shew that the tenancy was a yearly one.

Further, this notice was a bad notice, being given on September 24 to quit at the expiration of three months, instead of at the end of a quarter of the tenancy which had commenced on October 1: *Doe* v. *Lea.* (3)

[LORD ALVERSTONE C.J. referred to *Sidebotham* v. *Holland.* (4)]

In *Soames* v. *Nicholson* (5) the words were, "subject to three months' notice at any time to terminate this agreement."

R. G. Ellis, for the respondents. Upon the true construction of this agreement it did not create a yearly tenancy at all, but only a tenancy determinable at any time by three months' notice; it does not in any way purport to create a yearly tenancy: *Doe* v. *Grafton.* (6) This was a good notice to determine the tenancy at the end of 1902: *Doe* v. *Smith.* (7)

LORD ALVERSTONE C.J. I think that the cases which turn upon the effect of a notice to quit are to some extent unsatisfactory, because we have to apply rules of law to agreements made in colloquial language. In this case, however, there are certain definite rules which prevent us from coming to the same conclusion as that at which the county court judge has arrived. The agreement in this case provides for a tenancy at an annual rent of 25*l.* from October 1. The authorities, in my opinion, sufficiently establish that this, if there were nothing more, would create a yearly tenancy determinable by half a year's notice to expire on October 1 in any year. Then comes the clause that the tenants shall pay the rates and taxes,

(1) (1809) 1 Taunt. 555.
(2) (1814) 3 Camp. 510; 14 R. R. 828.
(3) (1809) 11 East, 312.
(4) [1895] 1 Q. B. 378.
(5) [1902] 1 K. B. 157.
(6) (1852) 18 Q. B. 496.
(7) (1836) 5 A. & E. 350; 44 R. R. 442.

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which points to a yearly tenancy, because these are not usually paid by a mere quarterly tenant. Then there is the provision: "three months' notice on either side to terminate this agreement." I think that that brings the case within *Doe* v. *Donovan* (1), and that its effect is only to cut down the usual half-year's notice to three months' notice, but not otherwise to alter the character of the yearly tenancy. The case of *Doe* v. *Grafton* (2) is the one which is most nearly in favour of the defendants; but in that case the agreement was that the tenancy should continue until either party should give a certain notice to quit. I have come, therefore, to the conclusion that in this case there was a yearly tenancy, and that the three months' notice to quit must expire with a year of the tenancy. The tenancy has not been duly determined, and this appeal must be allowed.

KENNEDY J. I am of the same opinion. It is not, I think, very satisfactory to have to construe a document like this; but I think that we must adopt the fairest construction, which is that this was a yearly tenancy determinable by notice at the end of any year.

Appeal allowed.

Solicitors for plaintiff: *Jaques & Co., for Samuel Wright, Morgan & Co., Bradford.*

Solicitors for defendants: *Farmer, Rawson & Co., for Banks Newell, Rawstorne & Hammond, Bradford.*

(1) 1 Taunt. 555. (2) 18 Q. B. 496.

W. A.

[IN THE COURT OF APPEAL.]

C. A.
1904
Feb. 8.

STOCKDALE *v.* ASCHERBERG.

Landlord and Tenant—Tenancy for Three Years—Agreement by Tenant to pay Outgoings—Order by Sanitary Authority to reconstruct Drain—Liability of Tenant.

The plaintiff let a house to the defendant for a term of three years at the yearly rent of 55*l.*, the defendant agreeing to pay all "outgoings in respect of the premises." During the tenancy the plaintiff, in obedience to an order from the sanitary authority, reconstructed the drainage system of the house at a cost of 83*l.* 10*s.*:—

Held, affirming the decision of Wright J., that the defendant was liable under the agreement to repay to the plaintiff the amount so expended.

APPEAL from judgment of Wright J. (1) in an action tried by him without a jury.

The action was brought by the plaintiff to recover from the defendant a sum of 83*l.* 10*s.* under the following circumstances. By an agreement in writing dated March 25, 1902, the plaintiff let a house at Kilburn to the defendant for a term of three years at the yearly rent of 55*l.* By the agreement the defendant agreed to pay "all taxes, rates, assessments, and outgoings of every description for the time being payable in respect of the premises as they become due, landlord's property tax only excepted." The defendant agreed also to keep and leave the premises in as good condition as they were then in, reasonable wear and tear excepted. On September 4, 1902, a notice was served upon the plaintiff by the Willesden Urban District Council under the provisions of the Public Health Act, 1875, stating that a nuisance existed upon the premises, and requiring the plaintiff to abate it, and for that purpose to take up and relay throughout the premises the existing drain, which was defective. The plaintiff, in obedience to the notice, executed the required work at the cost of 83*l.* 10*s.*; and the action was brought to recover that sum from the defendant under the

(1) [1903] 1 K. B. 873.

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before-mentioned agreement. The learned judge gave judgment for the plaintiff for the amount claimed.

Foa, for the defendant. It was laid down in *Foulger* v. *Arding* (1) that covenants such as that in question must be assumed to relate only to matters which may reasonably be supposed to have been contemplated by the parties as being within the purview of such a contract. In considering whether the particular obligation could have been contemplated by the covenant, all the circumstances must be considered, including the length of the term, the nature of the work, whether a permanent improvement or not, and the proportion of the cost of it to the rent reserved. In *Valpy* v. *St. Leonard's Wharf Co.* (2) Farwell J. held, in the case of a tenancy of a cottage from year to year at a rent of 20*l.*, that an agreement by the tenant to pay outgoings did not include the expense of paving a yard in obedience to a notice from the local authority at a cost of 58*l.* In *In re Warriner* (3), where the lease was for three years, Swinfen Eady J. followed the decision of Wright J. in the present case. In *Harris* v. *Hickman* (4), where the tenancy was from year to year, Wright J. held himself bound by the decision of Farwell J. in *Valpy* v. *St. Leonard's Wharf Co.* (2) Therefore, as the decisions now stand, a distinction is drawn for the present purpose between cases where the tenancy is merely from year to year and cases where the tenancy is for three years. It is contended that the decisions on this subject with regard to yearly tenancies are right, and those with regard to tenancies for three years are wrong. In *Batchelor* v. *Bigger* (5), where the lease was for three years, Kay J. held that street-paving expenses came within the word "outgoings"; but it is to be observed that the fact of the street not being paved is obvious to the eye, and a person, becoming tenant of premises in such a street, must be deemed to contemplate that the local authority may take steps to compel the frontagers to pave the street. In the present case

(1) [1902] 1 K. B. 700.
(2) (1903) 1 L. G. R. 305.
(3) [1903] 2 Ch. 367.
(4) Ante, p. 13.
(5) (1889) 60 L. T. 416.

the defect in the drainage is a latent matter, and the tenant could not be expected to contemplate that the local authority would require a wholly new system of drainage to be laid down at a cost exceeding a year and a half's rent of the premises. It is submitted that, by long-established custom, terms not exceeding three years stand on a different footing from longer terms, which can only be created by deed. Under such tenancies the liability of the tenants as regards repairs is always lighter, and the tenant does not contemplate liability in respect of permanent structural repairs or improvements required by the local authority. It is submitted that the term "outgoings" may well bear a more limited construction in the case of such tenancies. The agreement in this case appears to contemplate "outgoings" which are in the nature of recurrent expenses, such as rates and assessments. The terms of the agreement with regard to the repairs to be done by the tenant in this case are material as indicating that such a charge as this cannot have been contemplated.

Hohler, for the plaintiff, was not called on to argue.

COLLINS M.R. Though one may feel some sympathy with a tenant for a term of three years, who complains of being mulcted to the extent of more than a year and a half's rent in respect of the expenses of an improvement, which he did not contemplate, after all the question is whether he has bound himself by his contract to accept that liability. It is clearly established by the decisions that the word "outgoings" in such a covenant covers expenditure of the kind here in question. These expenses were incurred in obedience to an order made by the local authority for the alteration of the system of drainage on the premises, so as to bring it up to the modern standard. Such an order is no doubt a drastic one, but one which cannot be considered as unlikely to be made, having regard to the condition of the demised premises. The defendant took the premises in an insufficient condition as regards drainage. It seems to me impossible to regard it as so far outside the contemplation of the parties that the local authority, whose duty it is to see that the drainage of premises

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Collins M.R.

is kept up to the requisite standard of sanitary efficiency, should make such an order, that it would be unreasonable to suppose that the defendant undertook such a liability by the agreement. It is every-day experience that local authorities require such improved sanitary arrangements. That being so, if a tenant makes an agreement in perfectly clear and unambiguous terms that he will bear all outgoings, I do not see how we can throw aside the plain meaning of the language used, and introduce some limitation of that meaning, which it would be very difficult, if not impossible, to define. For these reasons I think the appeal must be dismissed.

ROMER L.J. and MATHEW L.J. concurred.

Appeal dismissed.

Solicitors for plaintiff: *Sharpe, Parker & Co., for H. Fielding, Canterbury.*

Solicitors for defendant: *Potter & Heath.*

E. L.

In re REIS.
Ex parte CLOUGH.

1903
Dec. 14.

1904
Jan. 18.

Bankruptcy—Marriage Settlement—Husband's Covenant to settle all his after-acquired Property—Trade Profits invested in Land—Husband's Act of Bankruptcy—Conveyance to Settlement Trustees — Title of Trustee in Bankruptcy—"Become Bankrupt"—Bankruptcy Act, 1883 (46 & 47 *Vict.* c. 52), *s.* 4, *sub-s.* 1 (*H*); *s.* 43; *s.* 47, *sub-s.* 2; *s.* 49.

For the purposes of s. 47 of the Bankruptcy Act, 1883—which enacts (sub-s. 2) that any covenant made in consideration of marriage for the future settlement on or for the settlor's wife or children of any property wherein he had not at the date of his marriage any estate or interest, shall, on his "becoming bankrupt" before the property has been "actually transferred" pursuant to the covenant, be void against the trustee in the bankruptcy—the words "become bankrupt" must be construed in the light of s. 43 of the Act, and refer to the commencement of the bankruptcy, i.e., to the earliest date to which the title of the trustee relates back by virtue of s. 43.

In 1879 A. on his marriage covenanted to settle all his after-acquired property (except business assets) upon trusts for the benefit of his wife and children. By 1901 he had made large profits in his business, and laid out 17,000*l.* in purchasing and furnishing a freehold house, where he resided with his wife and children. In April, 1903, he was in financial difficulties, and on May 26 he committed an act of bankruptcy, and in July he was adjudicated bankrupt on another act of bankruptcy committed on June 29. Meanwhile he had, on June 10, by two deeds transferred the house and furniture to his settlement trustees in pursuance of a written notice served on him by them on May 23:—

Held, that A. must be deemed to have become bankrupt on May 26, and that, the house and furniture not having been "actually transferred" before that date, the deeds of June 10 were void against the trustee in bankruptcy so far as necessary to pay the debts in the bankruptcy.

Ex parte Bolland, (1873) L. R. 17 Eq. 115, questioned.

Held, also, that s. 49 of the Act (protecting bonâ fide transactions without notice) did not apply to a transaction that was voidable under s. 47.

In 1879 the debtor on his marriage by deed settled certain furniture and other personal property upon trusts for the benefit of his wife and children; and he thereby also covenanted that all real and personal property (except business assets) to which he should become entitled during the joint lives of himself and his wife should, as soon as circumstances would admit, be assured

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REIS, *In re.* CLOUGH, *Ex parte.*

by him to the settlement trustees to hold on the trusts before declared. At the time of his marriage the debtor was engaged in a business which proved unsuccessful, and in 1894 he started as an outside stock and share dealer. By 1901 he had made profits exceeding 50,000*l.*, and he then invested some 17,000*l.* in purchasing and furnishing a freehold house, where he resided with his wife and family. In April and May, 1903, he was in financial difficulties, and on May 26, which was contango day on the Stock Exchange, he through his solicitor intimated to some of his Stock Exchange creditors (who were his only unsecured creditors) that he would be unable to meet his liabilities on May 28, which was pay day on the Stock Exchange. He did this in order that they might exercise their own discretion as to whether or not they would at once close his accounts with them. On the following July 15 a receiving order was made against the debtor on a bankruptcy petition presented against him by a Stock Exchange creditor, grounded on an act of bankruptcy committed on June 29, and on July 23 he was adjudicated bankrupt. In the meantime, on June 10, 1903, the debtor, in pursuance of a written notice served upon him on the previous May 23 by his marriage settlement trustees, by two deeds conveyed to them the freehold house and furniture to be held by them upon the trusts of the settlement. The trustee in bankruptcy alleged that the debtor committed an act of bankruptcy on May 26, and claimed :—

1. That the deeds of June 10 were void as against him on the ground—

(*a*) That they were voluntary settlements,

(*b*) or fraudulent conveyances under the statute 13 Eliz. c. 5.

(*c*) That they were executed and made after the commencement of the bankruptcy.

2. That the settlement of September, 1879, so far as regards the after-acquired property of the bankrupt, was fraudulent and void under the bankruptcy laws.

Considerable argument was addressed to the Court on all the above points; but inasmuch as the judgment of the Court was confined to the issue raised by 1 (*c*), this report is limited to that point.

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Reed, K.C., *A. J. David*, and *Adler*, for the trustee in bankruptcy. First, s. 47 is retrospective and applies to an ante-nuptial settlement made before the passing of the Act: *Ex parte Todd.* (1) Secondly, a covenant by a settlor to settle all his after-acquired property falls within the principle of *Ex parte Bolland* (2), and is void against the bankruptcy laws. But the question really turns on the meaning of the words "become bankrupt" in s. 47. It is submitted that these words must be taken in the sense which business men would attach to them, and mean the commencement of the bankruptcy: s. 43. If so, the debtor became bankrupt on May 26, because what occurred on that day was equivalent to a notice by the debtor to his creditors that he was about to suspend payment of his debts, and was an act of bankruptcy under s. 4, sub-s. 1 (H): *In re Scott* (3); *Crook* v. *Morley* (4); and by s. 43 the title of the trustee in bankruptcy relates back to that date, which is prior to the transfer of the property to the settlement trustees. The respondents cannot rely on s. 49 of the Act, because the provisions of that section are subject to s. 47.

Horridge, K.C., and *Muir Mackenzie*, for the settlement trustees. There is no authority under which a covenant by a man for valuable consideration to settle all his after-acquired property is necessarily void in bankruptcy, except *Ex parte Bolland.* (2) In the judgment in that case it is said that "there are many cases in which such settlements have been set aside"; but search has been made and no case can be found, and it is submitted that the decision in that case is not in accord with the principle of the judgment of the House of Lords in *In re Tailby.* (5) When once the after-acquired asset comes into existence it is bound by the covenant and must be assigned on request. The deeds of June 10 were in pursuance of and relate back to the covenant. Next, on the evidence there was no such notice on May 26 of an intention to suspend payment as to constitute an act of bankruptcy

(1) (1887) 19 Q. B. D. 186.
(2) L. R. 17 Eq. 115.
(3) [1896] 1 Q. B. 619.
(4) [1891] A. C. 316.
(5) (1888) 13 App. Cas. 523.

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within the meaning of the Act and of the authorities. But if there was then an act of bankruptcy the question is, What is the meaning of the words "become bankrupt" in s. 47? In the present Act the bankruptcy of a debtor is a varying date, and different words are used in different sections for the purpose. In ss. 20 and 54 the words are "adjudged bankrupt," and mean the date of adjudication. In ss. 42, 43, and 44 the words are "the commencement of the bankruptcy," and mean the date to which the title of the trustee relates back. In s. 47 the words are, not "at the commencement of the bankruptcy," but "if the settlor becomes bankrupt." Therefore some difference in meaning is intended between s. 47 and the other sections, and it is submitted that the words "become bankrupt" mean "being adjudicated bankrupt." If so, then the property was actually transferred before the debtor became bankrupt. But at any rate the furniture had long before May 26 been brought into the house, which was the matrimonial domicil, and was in the actual possession and enjoyment of the wife, and her possession was consistent with the trusts of the settlement: *Ramsay* v. *Margrett* (1); *In re Satterthwaite.* (2)

Hansell, for Mrs. Reis.

Reed, K.C., in reply.

WRIGHT J. There are several interesting points in this case which have been argued with the greatest ability, but I do not think it is either necessary or desirable to deal with any of them except the questions which arise under 1 (*c*); and the first point to consider is what took place on May 26. Before I deal with that let me say this. I feel the greatest doubt as to whether *Ex parte Bolland* (3) can be treated as laying down a general rule, or having anything like the generality of application which the head-note to it might seem to suggest. I should hesitate very long before I took the view that that case would govern a case of this kind. But it is not necessary for me to decide that, because I prefer to deal with

(1) [1894] 2 Q. B. 18. (2) (1895) 2 Man. 53.
(3) L. R. 17 Eq. 115.

the case under s. 4, sub-s. 1 (H), and s. 47 of the Act. Now s. 4, sub-s. 1 (H), of the Bankruptcy Act makes it an act of bankruptcy, "If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts"; and the first question is the question of fact, whether on this May 26 a notice of that kind was given by Reis. [The learned judge then dealt with the evidence at length, and held that the debtor committed an act of bankruptcy on May 26 within the meaning of sub-s. 1 (H) of s. 4 of the Act, and continued:—] That being the conclusion of fact, on June 10 the debtor transfers to the trustees of his marriage settlement the after-acquired property which he had covenanted by the marriage settlement to transfer. Then there was another act of bankruptcy on June 29, on which a receiving order was made on July 15. The effect of the whole is that the bankruptcy relates back to May 26. Then s. 47, sub-s. 2, says, "Any covenant or contract made in consideration of marriage, for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property of or in right of his wife, shall, on his becoming bankrupt, before the property or money has been actually transferred or paid pursuant to the contract or covenant, be void against the trustee in the bankruptcy." The first question on the construction of those words is, What is the meaning of "becoming bankrupt"? There is, apparently, no authority to guide me. Strong reasons are urged for the view that the words "commencement of the bankruptcy" would have been used if that had been intended. On the other hand, it is said that, if the date of adjudication had been intended, the use of the words "adjudicated bankrupt" would have been more natural than "becoming bankrupt." It seems to me that I must construe "becoming bankrupt" in s. 47 by the light of s. 43, which says—reading only the material words—"the bankruptcy of a debtor shall be deemed to commence at the time of the first of the acts of bankruptcy proved to have been committed within three months next preceding the date

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of the presentation of the bankruptcy petition." Now if that is so, the bankruptcy here must be deemed to have commenced as from May 26, and I think that the bankrupt must be deemed to have become bankrupt on that date. I am quite alive to the possibility that the view which I am taking is wrong, but I think it is the true view. Then comes the question, What is the proper meaning of becoming bankrupt before the property or money has been "actually transferred or paid" pursuant to the contract or covenant? It has been argued with great force that constructive transfers are enough. It seems to me, however, that the very object of the language used is to exclude all such arguments, and that the sub-section is meant to apply unless an actual legal transfer pursuant to the contract or covenant has been made before the commencement of the bankruptcy. The very object of the words seems to me to be to draw the line somewhere short of the actual transfer. The cases of *Ramsay* v. *Margrett* (1) and *In re Satterthwaite* (2) appear to me to be quite different and do not apply. They were on the Bills of Sale Act. In *Ramsay* v. *Margrett* (1) there had been an actual verbal sale and payment of the consideration; and in *In re Satterthwaite* (2) the furniture had been actually assigned to trustees for the wife, and under those circumstances it was held that the possession, which might on the face of it be ambiguous, must follow the legal title. Here there was no actual transfer before the commencement of the bankruptcy on May 26. Then it remains only to ask whether s. 47 is in any way subject to or modified by s. 49. It has not been really argued by the respondents that s. 49 overrides s. 47; and I do not think it could be, because s. 49, on the face and the terms of it, appears only to apply when s. 47 does not apply. And, further, the enumeration of the cases to which s. 49 is to be applicable does not include any description which is properly applicable to what took place when this property was transferred to the trustees. Therefore I think s. 49 has no application. As I have said, I think it is undesirable to decide the difficult and doubtful questions which arise on other points in the case, because it seems to me I am bound to come to

(1) [1894] 2 Q. B. 18. (2) 2 Man. 53.

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the conclusion at which I have arrived on the evidence and on the construction of s. 47. There will be a declaration that the trustee is entitled to set aside the assignment and conveyance of June 10 so far as may be necessary to pay the debts in the bankruptcy.

Solicitors for trustee in bankruptcy: *W. H. Martin & Co.*
Solicitors for respondents: *Norden & Co.; Spyer & Co.*

H. L. F.

[IN THE COURT OF APPEAL.]

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Feb. 10.

KILGOUR *v.* GADDES.

Easement—Prescription—Right of Way—Enjoyment as between Tenants—Dominant and Servient Tenements—Unity of Ownership—Forty Years' User—Prescription Act, 1832 (2 & 3 *Will.* 4, *c.* 71), *s.* 2.

An easement, such as a right of way, cannot, under s. 2 of the Prescription Act, 1832, be acquired by a tenant by user over land occupied by another tenant under the same landlord, even if that user has existed for the period of forty years mentioned in the section.

Dictum in *Harris* v. *De Pinna*, (1885–6) 33 Ch. D. 238, overruled.

APPLICATION by plaintiff for judgment or a new trial in an action tried by Walton J. with a jury.

The action was for trespass, claiming an injunction to restrain the defendant from wrongfully entering upon the plaintiff's premises for the purpose of drawing water at a pump situate thereon, and damages. The defendant in his defence, inter alia (1), pleaded that he had acquired a prescriptive title to the use of the pump by forty years' user under s. 2 of the Prescription Act, 1832, and he counter-claimed for a mandatory injunction to the plaintiff directing him to remove an obstruction erected by him to prevent the defendant's access to the pump, and for damages for disturbance of his easement.

The plaintiff occupied premises in Longtown, Cumberland,

(1) He also claimed that a right to the use of the pump had been granted by the lease under which he held. It was held that there was no such grant, but the facts and arguments as to that point are omitted, inasmuch as it involved no novel question of law.

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as assignee of a lease of them for ninety-nine years granted by Sir James R. J. Graham of Netherby in July, 1850. The defendant occupied adjoining premises as assignee of a lease of them for ninety-nine years granted by Sir James R. J. Graham in January, 1850. There was a pump situated on the plaintiff's premises in reference to which the dispute between the parties arose. In answer to a question left to the jury by the judge, they found that, for the period of forty years before the commencement of the action, the pump had been used as of right by the occupiers of the defendant's premises. During that period the reversion in fee upon the leases, of which the plaintiff and the defendant were respectively assignees, had been in the same person. The learned judge held, on the authority of *Harris* v. *De Pinna* (1), that the defendant had acquired a right to the use of the pump as against the plaintiff under s. 2 of the Prescription Act, 1832; and that the claim of the plaintiff therefore failed, and the defendant was entitled to an injunction and nominal damages on his counter-claim.

L. Sanderson, K.C., and *J. Lumb*, for the plaintiff. Except with regard to easements of light, which are placed on a special footing by s. 3 of the Prescription Act, 1832, the object of the Act was merely to prevent the claim of an easement by prescription from being defeated by proof of the user having originated within the period of legal memory. In other respects the mode of acquiring an easement, and the nature of the user by which it can be acquired, remain as at common law. It is clear that no such easement as is here in question could be acquired at common law by user under the circumstances of the present case: *Large* v. *Pitt.* (2) The acquisition of an easement by prescription merely for a term of years is unknown to the common law. Such a prescriptive easement as a right of way could only be acquired by the owner in fee of one tenement against the owner in fee of another. Here the ownership in fee of the supposed dominant and servient tenements was during the enjoyment of the alleged easement in the same person; and therefore an easement could not possibly be acquired at common

(1) 33 Ch. D. 238.

(2) (1797) 2 Peake, 152.

law by such user as took place. As Lord Cairns pointed out in *Gayford* v. *Moffatt* (1), the possession of the tenant is in contemplation of law that of the landlord, and it is contrary to first principles to suppose that the tenant could gain an easement over adjoining land belonging to his landlord. In order that an easement may be acquired by user under s. 2 of the Prescription Act, 1832, the user must be as of right. The user cannot be as of right where the fee simple in the supposed dominant and servient tenements is in the same landlord. The provisions of s. 8 of the Prescription Act, 1832, clearly shew that an easement such as a right of way cannot be acquired while both tenements are under lease as in the present case.

[They also cited *Harris* v. *De Pinna* (2); *Bright* v. *Walker* (3); *Frewen* v. *Philipps* (4); *Fahey* v. *Dwyer* (5); *Beggan* v. *M'Donald* (6); *Timmons* v. *Hewitt* (7); *James* v. *Plant.* (8)]

Cavanagh, for the defendant. There are dicta in several cases, no doubt, unfavourable to the defendant's contention, all of which really appear to be based upon an observation of Parke B. in *Bright* v. *Walker* (3), but there is really no decision on the subject which is binding on this Court. In *Bright* v. *Walker* (3) the question arose with reference to enjoyment for the period of twenty years mentioned in the earlier part of s. 2. It may be that a prescriptive right could not be acquired at common law by user under such circumstances as existed in the present case, but it is submitted that, under s. 2 of the Prescription Act, 1832, prescription by enjoyment for the period of forty years stands on a different footing. The portion of that section which refers to prescription at common law, and speaks of enjoyment by a "person claiming right thereto," only applies to the twenty years' period. The section gives an absolute and indefeasible right, where the easement has been enjoyed for forty years, with the sole exception of the case where it has been enjoyed by some consent or agreement

(1) (1868) L. R. 4 Ch. 133.
(2) 33 Ch. D. 238.
(3) (1834) 1 C. M. & R. 211; 40 R. R. 536.
(4) (1861) 11 C. B. (N.S.) 449.
(5) (1879) 4 L. R. Ir. 271.
(6) (1877) I. R. 11 C. L. 362; (1878) 2 L. R. Ir. 560.
(7) (1888) 22 L. R. Ir. 627.
(8) (1836) 4 A. & E. 749; 43 R. R. 465.

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expressly given or made for that purpose by deed or writing. There is no greater anomaly involved in holding that a right of way may be acquired by a tenant by user over the land of another tenant of the same landlord than in holding that a right of light may be so acquired, as in *Frewen* v. *Philipps*. (1) In *Harris* v. *De Pinna* (2) Chitty J. held upon the authority of *Beggan* v. *M'Donald* (3) and *Fahey* v. *Dwyer* (4) that by forty years' enjoyment an easement may be acquired under s. 2 of the Prescription Act, 1832, by one tenant against another tenant of the same landlord. *Fahey* v. *Dwyer* (4) is directly in point to this case. Under s. 8 of the Act the reversioner may prevent the right so acquired against his tenant from binding him by resisting the claim of the easement within three years after the determination of the term in the servient tenement, but it is submitted that the forty years' user creates a right as against the tenant. [He also cited *Gardner* v. *Hodgson's Kingston Brewery Co.* (5); *Tickle* v. *Brown*. (6)]

L. Sanderson, K.C., for the plaintiff, was not called upon to reply.

COLLINS M.R. The question in this case is whether, as between two persons who are termors of different tenements, a right of way to a pump has been acquired by prescription for the owner of one of the tenements over the other tenement under s. 2 of the Prescription Act, 1832. I say a right for the owner, for it appears to me clear that under the section the right cannot be acquired merely by a tenant as against a tenant, but must be acquired by the owner of the fee in one of the tenements as against the owner of the fee in the other. Here the respective tenants of the so-called dominant and servient tenements hold under the same landlord; and, if the proposition be correct that a prescriptive right of way under s. 2 of the Act must be acquired by the owner of the fee in one of the tenements as against the owner of the fee in the other, then in this case the defendant's contention would involve the result

(1) 11 C. B. (N.S.) 449.
(2) 33 Ch. D. 238.
(3) I. R. 11 C. L. 362; 2 L. R. Ir. 560.
(4) 4 L. R. Ir. 271.
(5) [1903] A. C. 229.
(6) (1836) 4 A. & E. 369; 43 R. R. 358.

that the tenant of one of the tenements has acquired for his landlord a right of way over the landlord's own land; which is impossible and inconsistent with the essential notion of a right by prescription, namely, that the right is acquired by the owner of land over land belonging to another owner. I limit what I am saying to such an easement as a right of way, because questions with regard to the easement of light stand on a different footing, and depend on the provisions of s. 3 of the Act. The present case depends on s. 2, which deals with prescriptive rights of way and other similar easements. Sect. 2 of the Prescription Act provides that "no claim which may be lawfully made at the common law, by custom, prescription or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed, or derived, upon, over, or from any land or water of our said Lord the King, his heirs or successors, or being parcel of the Duchy of Lancaster or of the Duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by shewing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated: and, where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing." The words "so enjoyed as aforesaid" seem to shew clearly enough that the enjoyment for the period of forty years must be as of right, but the matter is made still clearer by the terms of s. 5 of the Act, which deals with the mode of pleading prescription under the Act, and provides, "that in all pleadings to actions of trespass, and in all other pleadings wherein before the passing of this Act it would have been necessary to allege the right to have existed from time

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immemorial, it shall be sufficient to allege the enjoyment thereof as of right, by the occupiers of the tenement in respect whereof the same is claimed, for and during such of the periods mentioned in this Act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done." That is a perfectly clear enactment shewing, if there were any doubt with regard to the matter on the terms of s. 2, that the enjoyment set up, whether for the period of twenty years or for that of forty years, must be as of right. The point was early taken that this provision applied to a claim of the right to light under s. 3 of the Act, but it was held that it did not, and that the access of light need not be enjoyed as of right, in order to confer a title to it under the Act. With regard to easements such as a right of way, as was pointed out by Romer L.J. during the argument, and by Palles C.B. in *Timmons* v. *Hewitt* (1), the reason why a prescriptive right of way cannot be acquired by user by one tenant over land in the occupation of another tenant of the same owner is that the enjoyment of the easement in that case would not be as of right. The learned Chief Baron said in *Timmons* v. *Hewitt* (1): "Where the two tenements are held by termors under the same landlord, prescription does not apply; because, as pointed out by Lord Cairns in *Gayford* v. *Moffatt* (2), 'the possession of the tenant of the demised close is the possession of his landlord; and it seems to be an utter violation of the first principles of the relation of landlord and tenant to suppose that the tenant, whose occupation of close A was the occupation of his landlord, could by that occupation acquire an easement over close B, also belonging to his landlord.' This doctrine was approved and acted upon by the Court of Common Pleas in this country in *Clancy* v. *Byrne*. (3) If I am asked how it is consistent with the Prescription Act, I answer that such user and enjoyment is not as of right within the meaning of the 2nd section. It is a user by a termor, who, if he acquire the right, must acquire it as incident to the land of which he is termor, and thus for the benefit of his

(1) 22 L. R. Ir. 627. (2) L. R. 4 Ch. 133.
(3) (1877) I. R. 11 C. L. 355.

reversioner. Such user cannot be as of right, unless a reversioner can in law by user acquire a right against himself." That reasoning appears to me conclusive of the present case. There was a long discussion in the course of the argument as to the possibility of a termor under one landlord acquiring for his landlord an easement by user over land in the occupation of a termor under another landlord, and as to whether an easement in such a case could be acquired, unless and until the user had continued for the period of three years after the determination of the term in the servient tenement without interference by the reversioner. That no doubt raises an interesting question, which appears to have been decided in Ireland in the case of *Beggan* v. *M'Donald* (1) contrary to the view expressed in this country in *Bright* v. *Walker* (2) and also in *Wheaton* v. *Maple & Co.* (3), in neither of which cases, however, was it necessary actually to decide the point. That question, however, is not the question raised in the present case. The judgment of Walton J. in the Court below appears to be based entirely on the authority of what was said by Chitty J. in *Harris* v. *De Pinna*. (4) That learned judge did not decide the point, for it was really only a by-point in the case; but he appears to have expressed an opinion that an easement of the class to which a right of way belongs can be acquired by user by one tenant over the land of another tenant of the same landlord. But, when the observations of Chitty J. are examined, it appears to me that they rest on an unsound foundation. They are based on the cases of *Fahey* v. *Dwyer* (5) and *Beggan* v. *M'Donald*. (1) The latter case was certainly no authority for any such proposition. What appears to have been decided in that case is that such an easement could be acquired for the owner in fee of land by forty years' user by a termor as against a termor under another landlord, although the period of three years from the determination of the term mentioned in s. 8 had not expired, and it could not be known whether the reversioner would interfere before the

(1) 2 L. R. Ir. 560.
(2) 1 C. M. & R. 211; 40 R. R. 536.
(3) [1893] 3 Ch. 48.
(4) 33 Ch. D. 238.
(5) 4 L. R. Ir. 271.

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expiration of that period. It was a decision as to the effect of user as between tenants under different owners, and not as between tenants under the same owner. The case is therefore no authority on the present question. The case of *Fahey* v. *Dwyer* (1) does purport to be a decision as to the possibility of one tenant of a landlord acquiring such an easement as a right of way as against another tenant of the same landlord. The head-note is as follows: "A prescriptive right of way may be acquired in respect of one tenement, by user for forty years, against another held for a term of years under the same landlord; and such right is not necessarily determined upon the expiration of the lease, when the tenant of the servient tenement continues in occupation upon the same terms as before." Lawson J. said, in giving judgment in that case: "We think that in this case the defendant is entitled to maintain the verdict which he has got. He has a right of way, which he has been in the enjoyment of, as of right, for a period of forty years, as found by the jury. I see no reason why the Prescription Act should not apply as between two tenants of adjoining lands. Mr. Gibson has argued it cannot. That is met by the case of *Frewen* v. *Philipps* (2) and the observations of Kindersley V.-C. in *Daniel* v. *Anderson*. (3) There is no reason why it should not apply as between two tenants so as to bind them, though the landlord should not be bound. But, if there was any difficulty about the case, *Beggan* v. *M'Donald* (4) appears to remove it; for it decided that a period of forty years' enjoyment is absolute and indefeasible, and that *Bright* v. *Walker* (5) applies only to a twenty years' enjoyment." The learned judge therefore rests his decision on *Frewen* v. *Philipps* (2) and *Beggan* v. *M'Donald*. (4) I think that in thus applying *Frewen* v. *Philipps* (2) he was probably misled by the head-note of the report of that case, which does seem to suggest that an easement may be acquired by one tenant against another, whereas it must be acquired, if at all, for the owner in fee; and the decision in that case that a right to light may

(1) 4 L. R. Ir. 271.
(2) 11 C. B. (N.S.) 449.
(3) (1862) 31 L. J. (Ch.) (N.S.) 610.
(4) 2 L. R. Ir. 560.
(5) 1 C. M. & R. 211; 40 R. R. 536.

be obtained by user by one tenant over the land of another tenant of the same landlord, has no bearing on the question of a right of way, and does not decide that, in the case of such a right, an easement can be acquired by one tenant as against another tenant. I have already dealt with the case of *Beggan* v. *M'Donald* (1), and pointed out that it is no authority on the question now under discussion. The cases therefore upon which Chitty J. relied do not seem to afford an adequate foundation for the conclusion which he derived from them. In the case of *Wheaton* v. *Maple & Co.* (2) the view which I am expressing was very clearly stated by Lindley L.J. in his judgment. He dealt first with the question of the possibility of acquiring an easement as against a tenant of land by a presumption of a lost grant as follows: "I am not aware of any authority for presuming, as a matter of law, a lost grant by a lessee for years in the case of ordinary easements, or a lost covenant by such a person not to interrupt in the case of light, and I am certainly not prepared to introduce another fiction to support a claim to a novel prescriptive right. The whole theory of prescription at common law is against presuming any grant or covenant not to interrupt, by or with any one except an owner in fee. A right claimed by prescription must be claimed as appendant or appurtenant to land, and not as annexed to it for a term of years. Although, therefore, a grant by a lessee of the Crown, commensurate with his lease, might be inferred as a fact, if there was evidence to justify the inference, there is no legal presumption, as distinguished from an inference in fact, in favour of such a grant. This view of the common law is in entire accordance with *Bright* v. *Walker* (3), where this doctrine of presumption is carefully examined." He was there dealing with the question of an implied grant, but he subsequently dealt with the question of prescription under the Prescription Act as follows: "I come now to the last question, namely, whether s. 3 has conferred an easement as against the Crown's lessees. So far as mere language is concerned, and apart from the nature of the subject-

(1) 2 L. R. Ir. 560. (2) [1893] 3 Ch. 48.
(3) 1 C. M. & R. 211; 40 R. R. 536.

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matter with which the section is dealing, I should see no difficulty in applying s. 3 to all English subjects, whether lessees of the Crown or other people; I should see no difficulty in reading 'absolute and indefeasible' as meaning absolute and indefeasible as against all persons to whom the section is applicable. But, if the section is so read, the consequence will necessarily be to create, by mere occupation and enjoyment, a class of easements which at common law could never have been acquired by prescription, but only by express agreement or grant. An easement for a term of years may, of course, be created by grant; but such an easement cannot be gained by prescription, and, not being capable of being so acquired, it does not fall within the scope of the statute 2 & 3 Will. 4, c. 71. The expression 'absolute and indefeasible' as applied to easements of all kinds, coupled with the declared object of the Act, which is to shorten the time for prescription, shews that the easements dealt with were easements appendant or appurtenant to land, and which, when acquired, imposed a burden for ever on the servient tenement." That passage is an authority for the proposition which I have laid down, namely, that, where one is not dealing with a question of the right to light, the only easement that can be claimed by prescription is one annexed to the fee simple in the land. That is a sufficient answer to the claim in this case. The reasons for the dictum of Chitty J. in *Harris* v. *De Pinna* (1), when examined, appear to be unsound, and the Court of Appeal, though it does not in express terms overrule that dictum, uses expressions which are clearly inconsistent with it. There is nothing, in my opinion, in any of the other points raised on behalf of the defendant. For these reasons I think the plaintiff's application for judgment must be allowed.

ROMER L.J. I am of the same opinion. In *Wheaton* v. *Maple & Co.* (2), it was pointed out that, under s. 2 of the Prescription Act, an easement cannot be acquired merely for a term of years. It must be acquired in favour of the dominant as against the servient tenement in respect of the fee simple

(1) 33 Ch. D. 238. (2) [1893] 3 Ch. 48.

in both tenements. The claim in the present case is of an easement which comes within s. 2 of the Act, and the enjoyment required, in order to create an easement under that section, is enjoyment as of right, in that respect differing from the enjoyment necessary in the case of a right to light under s. 3. In a case like the present, how can the enjoyment be said to have been as of right, where the same person was owner in fee of both the tenements? As pointed out in *Gayford* v. *Moffatt* (1) by Lord Cairns, the tenant's occupation is in the sight of the law that of his landlord, and, when the tenant goes on to the adjoining land of that landlord, he cannot be said to do so, as "claiming a right" in respect of the supposed dominant tenement on behalf of the freeholder, the supposed servient tenement being the freeholder's own land. On this short ground I think the plaintiff's application for judgment must be allowed. The Master of the Rolls has discussed the authorities bearing on the subject so fully that I do not think it necessary for me to say anything further concerning them.

MATHEW L.J. I agree. In this case the fee simple of the supposed dominant and servient tenements belonged to the same person. It is clear that, under such circumstances, an easement like a right of way could not have been created by prescription at common law. Such an easement can only be acquired by prescription at common law where the dominant and servient tenements respectively belong to different owners in fee, the essential nature of such an easement being that it is a right acquired by the owner in fee of the dominant tenement against the owner in fee of the servient tenement. If authorities were necessary for that proposition, the case of *Wheaton* v. *Maple & Co.* (2) and 2 Wms.' Saunders, 175 (*f*), (*i*), would suffice. If that be the nature of an easement by prescription, how can it be acquired under s. 2 of the Act where the owner of the dominant and servient tenements is the same person? Testing the matter by reference to the doctrine of lost grant, what would the presumed grant be in such a case? It would be a grant by the owner of the fee to himself.

(1) L. R. 4 Ch. 133. (2) [1893] 3 Ch. 48.

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It seems to me that these considerations entirely dispose of the case. I only wish to add that I do not think it necessary for the purposes of this case to express any opinion as to the correctness of the decisions of the Irish Courts, and that the observations which I have made are not applicable to the case of a right to light, which is altogether different from that of a right of way.

Plaintiff's application for judgment allowed.

Solicitors for plaintiff: *Ullithorne, Currey & Jennings*, for *C. B. Hodgson, Carlisle.*

Solicitor for defendant: *J. A. Broughton, Carlisle.*

E. L.

C. A. 1904 *Jan.* 22.

[IN THE COURT OF APPEAL.]

THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF HARROGATE *v.* DICKINSON.

Local Government—Building—Deposit of Plan—Time limited for Commencement of Work—Inclusion of several Buildings—Commencement of some Buildings within Time limited—Building not commenced within Time limited—Right to proceed without fresh Notice and Deposit—Harrogate Corporation Act, 1893 (56 & 57 *Vict. c. ccix.*), *s.* 27.

The Harrogate Corporation Act, 1893, by s. 27 enacts that "The deposit with the corporation of any plan of any street or building shall be null and void if the execution of the work specified in such plan be not commenced . . . . as to plans deposited after the passing of this Act, within three years from the date of such deposit . . . . and fresh notice and deposits shall, unless the corporation otherwise determine, be requisite."

The defendant, after the passing of the Act, deposited a plan shewing thereon a number of separate buildings. He commenced some of the buildings within three years from the deposit, and after the three years he commenced another of the buildings. On a case stated to determine whether the defendant had a right to proceed with this building without a fresh notice and deposit:—

Held, affirming the judgment of Wright J., that the plan must be taken to be a plan not of one building but of a number of buildings, and

that so far as it related to buildings not commenced within three years from the deposit thereof it was null and void, and, unless the corporation otherwise determined, a fresh notice and deposit were requisite.

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APPEAL from a decision of Wright J. upon a special case.

The plaintiffs were the urban district council for the borough of Harrogate, and the defendant was a builder and the owner of certain land within the borough.

The Harrogate Corporation Act, 1893, which was passed on August 24, 1893, provides by s. 27 as follows :—

"The deposit with the corporation of any plan of any street or building shall be null and void if the execution of the work specified in such plan be not commenced within the following periods (that is to say)—

"As to plans deposited after the passing of this Act within three years from the date of such deposit; and

"As to plans deposited before the passing of this Act within three years from the passing of this Act;

"And at the expiration of those respective periods fresh notice and deposits shall, unless the corporation otherwise determine, be requisite."

After the passing of the Act, the defendant, on October 1, 1894, deposited with the plaintiffs a plan of buildings proposed to be erected by him on his land. This plan was approved by the plaintiffs.

The plan shewed eleven houses, numbered 1 to 11, and two stables and coach-houses. One of the stables and coach-houses was completed, and the works in connection with Nos. 1, 2, and 3 of the dwelling-houses were commenced by October 1, 1896, and certificates of the completion of the three dwelling-houses, and that they were fit for human habitation, were subsequently given by the borough surveyor under a by-law relating to new buildings then in force in the borough.

More than three years after the deposit of the plan the defendant commenced to build Nos. 4 and 5 of the dwelling-houses. Part of the excavation for the foundations and basement of No. 6, the party wall between it and No. 5, part of the chimney-stack, and part provision for some of the fire-

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places of No. 6 were constructed with No. 5, and were in existence when a certificate was granted on June 6, 1899, by the surveyor, of the completion of Nos. 4 and 5, and that they were fit for human habitation.

In November, 1901, new by-laws were made, one of which was as follows: "From and after the date of the confirmation of these by-laws, all by-laws relating to new streets and buildings, previously in force in the district, shall be repealed except as regards any work commenced before the date of the confirmation of this by-law, or any work not so commenced, but of which plans shall either have been approved by the council before such date, or have been sent to the surveyor to the council one month at least before such date, and shall not have been disapproved by the council."

The new by-laws were confirmed on November 7, 1901, and, by reason of the alterations that had been made, the buildings shewn on the deposited plan did not comply with the new by-laws.

In January, 1902, the defendant commenced to build the second stable and coach-house, but was requested by the building inspector of the borough to discontinue the works, on the ground that the deposited plan was null and void; and the inspector's action was approved by the plaintiffs.

The contention on behalf of the plaintiffs was that the expression "the work specified in such plan" in s. 27 of the Harrogate Corporation Act, 1893, meant the work in connection with each dwelling-house and each stable and coach-house shewn on the plans, and that, as the plaintiffs had not "otherwise determined" within the meaning of s. 27, fresh notice and deposit were requisite in respect of any building not commenced within the period provided by the Act.

The contention on behalf of the defendant was—(1.) that the words "plan of any building" in s. 27 of the Act might include any number of dwelling-houses or other tenements, and that "the work specified in such plan" comprised the whole of the buildings there shewn; (2.) that by the completion of one stable and coach-house and the commencement of the dwelling-houses Nos. 1, 2, and 3 in October, 1896,

the defendant had commenced the execution of the work specified in the plan within three years from the deposit thereof; (3.) that the plaintiffs, by permitting the work on Nos. 4, 5, and 6 to be commenced after the expiration of three years from the deposit of the plan, and by granting a certificate in respect of Nos. 4 and 5, had determined that it was not requisite for the defendant to give a fresh notice or make a fresh deposit of plans, and were estopped from denying that they had so determined; (4.) that the present by-laws did not apply to the work shewn on the deposited plan inasmuch as it had been approved before the by-laws came into force.

The questions for the Court were, in effect, whether the contention of the plaintiffs was correct, or whether it was answered by the contentions of the defendant or any of them.

The learned judge stated that in his opinion the deposited plan was not, as argued, one plan for all purposes, but was equivalent to a number of plans of a number of buildings, included for convenience on one sheet of paper, in order to shew the sanitary authority what the general scheme of arrangement was to be. It would be unreasonable, in his opinion, to hold that the whole of the buildings shewn upon the plan were to be regarded as one building. He could not agree with the argument for the defendant—that because some of the buildings had been commenced before the new by-laws were approved, therefore all had been commenced. The point of estoppel failed, for it depended on the suggestion that the approved plan was one plan as to all the buildings indicated upon it, and the acquiescence of the corporation in the erection of Nos. 4 and 5 after the expiration of the three years did not affect the fact that, as to buildings that they had not approved, the deposited plan was null and void.

Judgment was given for the plaintiffs.

The defendant appealed.

Colefax, for the defendant. The judgment of the Court below proceeds on the assumption that the plan deposited by the defendant may be treated as if it were a number of plans. It is submitted that it is one plan relating to the whole of the

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proposed buildings. The execution of the work "specified in such plan," that is, work on the buildings indicated on the plan, was commenced within three years from the deposit. The corporation have throughout treated it as one plan. They did not suggest that new plans were required when they allowed houses to be commenced after the three years had expired, and to be certified on completion. They must therefore be taken to have determined that fresh notice and deposit were not requisite. The decision in *White* v. *Sunderland Corporation* (1) did not determine any point raised on this appeal, for it dealt only with a question of fact as to whether work had been commenced before new by-laws came into operation. If the plan is, as suggested, one plan, the new by-law of 1901 preserves all the previous rights of the defendant as to the buildings specified in the deposited plan.

Danckwerts, *K.C.*, and *W. Mackenzie*, for the plaintiffs, were not called on.

LORD ALVERSTONE C.J. In my opinion the question raised in this case is one of fact. I certainly see no grounds on which we should reverse the findings of the learned judge; but I should like just to say how the matter strikes me. It is perfectly true that the plan may for some purposes be called one plan, and I can well imagine cases arising where there might be a right to proceed with buildings founded on that which had been done with regard to buildings shewn on a plan; but in this particular case, and in each case, one must consider the facts. This plan shewed three houses in a side street, eight houses in a front street, and two coach-houses, detached from one another, with fence walls between, behind Nos. 1, 2, and 3 in the side street. The defendant built one of the coach-houses and Nos. 1, 2, and 3 of the dwelling-houses, and obtained certificates of completion. Then he built 4 and 5, and it must be taken for the purposes of this case that he did nothing more until after the new by-laws had come into operation. Under those circumstances Wright J. has held, having regard to s. 27 of the Harrogate Act, that

(1) (1903) 88 L. T. 592.

the defendant's plan was not a plan of one building which had been commenced within three years from the date of the deposit of the plan, but a plan of several buildings, and that therefore it was not protected by the new by-law which took effect in 1901, because s. 27 of the Harrogate Act required that after three years there should be a fresh notice and deposit. I think it would be an extreme proposition to say that, for all time, the defendant had the right to go on with the whole of the work indicated in his plan, because he had commenced to do part of the work or had built and completed some of the houses shewn on that plan.

In my opinion all the grounds taken by Wright J. are correct, and the defendant was not entitled to go on under the old by-laws in consequence of that which he had done in regard to the other houses. I think the appeal should be dismissed.

COLLINS M.R. I am of the same opinion.

ROMER L.J. I agree.

Appeal dismissed.

Solicitors for plaintiffs: *Sharpe, Parker, Pritchard & Co., for J. Turner Taylor, Harrogate.*

Solicitors for defendant: *Ullithorne, Currey & Jennings, for Francis Barber, Harrogate.*

A. M.

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Feb. 1.

THE SURREY COMMERCIAL DOCK COMPANY, APPELLANTS *v.* THE MAYOR, ALDERMEN, AND COUNCILLORS OF THE METROPOLITAN BOROUGH OF BERMONDSEY, RESPONDENTS.

Local Government — Metropolis—Notice of Buildings before commencing the same—Building ancillary to Work authorized by private Act—Inconsistent Enactments—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 76.

By s. 76 of the Metropolis Management Act, 1855, it is required that before beginning to lay or dig out the foundations of any new building seven days' notice in writing should be given to the local authority by the person intending to build. In 1894 a dock company obtained statutory authority to make certain alterations in their dock premises, and it became necessary as ancillary to those alterations to demolish a certain workshop and erect another in its place. No notice of the intention of the dock company to erect the new workshop was given to the local authority:—

Held, that the interference and control involved in s. 76 of the Metropolis Management Act, 1855, was inconsistent with the powers conferred upon the dock company under their statutory authority, and that there was therefore no need for them to give notice to the local authority of their intention to erect the new workshop.

CASE stated by a metropolitan police magistrate.

The appellants appeared in answer to a summons served upon them on behalf of the respondents charging that they, on or before April 3, 1903, unlawfully and without having given seven days' notice in writing to the respondents, began to lay or dig out the foundation of a new building in Finland Yard, Redriffe Road, in the borough of Bermondsey, contrary to the provisions of s. 76 of the Metropolis Management Act, 1855. (1)

(1) By the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 76, "Before beginning to lay or dig out the foundation of any new house or building within any such parish or district or to rebuild any house or building therein, and also before making any drain for the purpose of draining directly or indirectly into any sewer under the jurisdiction of the vestry or board of or for any such parish or district, seven days' notice in writing shall be given to the vestry or board by the person intending to build or rebuild such house or building or to make such drain, and every such foundation shall be laid at such level as will permit the drainage of such house or building in compliance with this Act and as the vestry or board shall order. . . ."

The case set out that upon the hearing of the summons the following facts were admitted or proved. The appellants are a company constituted and incorporated under the Surrey Commercial Dock Act, 1864, for the purpose of carrying on the undertaking defined in s. 15 of that Act, and for executing the works thereby authorized, and for maintaining the undertaking and works. The docks, basins, lands, buildings, and other premises, conveniences, and works defined in and authorized by that Act, are surrounded by and contained within dock fences and gates within which the appellants have and exercise all the powers conferred upon them by the Surrey Commercial Dock Act, 1864, the Surrey Commercial Dock Act, 1894, and the Acts incorporated with or amending those Acts.

Portions of the appellants' premises, upon which warehouses, workshops, and other buildings are erected, are entirely surrounded by water, and none of the portions so surrounded can be drained by gravitation into any of the respondents' sewers outside the appellants' premises. It would, however, be possible to drain them by syphons under the locks, but this would necessitate pumping and be very expensive. The respondents are under and by virtue of the London Government Act, 1899, the successors of the vestry of the parish of Rotherhithe, in which parish (now part of the borough of Bermondsey) the appellants' premises are situate, and are the local authority for the purposes of s. 76 of the Metropolis Management Act, 1855, and ss. 37 and 38 of the Public Health (London) Act, 1891. The appellants' premises are also situate within the district of the Port of London Sanitary Authority, which authority exercises certain powers under the Public Health (London) Act, 1891, within the appellants' premises under certain orders of the Local Government Board under s. 112 of the Public Health (London) Act, 1891. By the Surrey Commercial Dock Act, 1894, the appellants were empowered to make and maintain the works described in s. 4 of that Act, which works included "a new road (No. 1) and sewer commencing in Swing Bridge Road and terminating in Rotherhithe Lower Road, and the raising and alteration of the levels of Swing Bridge Road between the western end of the

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Swing Bridge and the commencement of such new road (No. 1) and sewer." In connection with the works specially authorized by this section the appellants were empowered by the same section to make and maintain (inter alia) all necessary and proper embankments, approaches, roads, buildings, yards, and other works and conveniences, and to alter, break up, stop up, and divert any pipes, wires, tubes, sewers, drains, and other works on or under any lands within the limits of deviation.

Pursuant to the powers conferred on them by s. 4 of the Surrey Commercial Dock Act, 1894, the appellants made the works mentioned in that section, and raised the level of the Swing Bridge Road. The raising of the level of the road rendered it necessary for them to construct an inclined approach for wheeled vehicles from the road to a yard belonging to them called Finland Yard, which was wholly surrounded by docks. This approach when completed would occupy the site of certain buildings in that yard, consisting of an engineer's office and a workshop for fitters and blacksmiths. In order, therefore, to construct the approach, it became necessary for the appellants to demolish these buildings and to erect other buildings in their stead in Finland Yard. The appellants have demolished the engineer's office, and are about to demolish the workshop for fitters and blacksmiths. They have constructed a temporary approach between the yard and the Swing Bridge Road, and have erected in the yard a new workshop, to be used in connection therewith, for the purposes of their undertaking instead of the old workshop. The appellants did not give the respondents any notice of their intention to lay or dig out the foundations of this building, but before erecting it they deposited with the Port of London Sanitary Authority detailed plans and specifications, which were duly approved by that authority, and the building was erected in conformity therewith.

Certain of the powers of a local authority under the Public Health (London) Act, 1891, and the Public Health Acts (Amendment) Act, 1890, have been conferred upon the Port of London Sanitary Authority by orders of the Local Government

Board under s. 112 of the Public Health (London) Act, 1891, but not (inter alia) ss. 37 and 38. The port sanitary authority claims to be the local authority within the dock walls of the appellants, and requires that no sanitary works should be carried out without first submitting detailed plans and specifications to it for its approval.

The appellants contended that the erection of the new workshop was rendered necessary by the raising and alteration of the Swing Bridge Road, and that the erection was therefore a work which they were authorized by s. 4 of the Surrey Commercial Dock Act, 1894, to make, and that the respondents had no power to control them in the exercise of their powers under that section, and that the appellants were under no obligation to serve notice on the respondents of their intention to lay or dig out the foundations of the new building under s. 76 of the Metropolis Management Act, 1855, since that section, so far as buildings erected pursuant to their special Act were concerned, had been repealed by implication by the special Act.

The respondents contended that the appellants were bound to give them notice under s. 76, since there was no clause in the Surrey Commercial Dock Act, 1894, expressly repealing that section, and the powers conferred by that Act or by any other Act upon the appellants could not be held to repeal by implication s. 76, unless it could be shewn that the two Acts were inconsistent. The magistrate found as a fact that the new building was a building within the meaning of s. 76, and had been erected by the appellants upon land belonging to them within the limits of deviation referred to in s. 4 of the Surrey Commercial Dock Act, 1894, and that the erection of the new building had been rendered necessary by the raising and alteration of the levels of the Swing Bridge Road authorized by s. 4. He was, however, of opinion that the provisions of s. 76 were not inconsistent with the provisions of s. 4 of the Surrey Commercial Dock Act, 1894, and he therefore held that the provisions of s. 76 requiring notice to be given to the respondents before beginning to lay or dig out the foundations of any building within that section were not repealed with regard to buildings erected by the appellants under s. 4 of the Act of 1894, and he

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accordingly convicted the appellants, and stated this case for the opinion of the Court.

Macmorran, K.C. (*Cunningham Glen* with him), for the appellants. Sect. 76 of the Metropolis Management Act, 1855, has no application to works carried out by the appellants under the powers given them by their private Act. The object of that section was to enable the local authority on receiving notice of the new buildings to take certain steps to secure proper control over the drains of those buildings; but, as appears from the case, there are no drains from this building to communicate with the sewers of the local authority. Sect. 76 is really inconsistent with the powers given by the Dock Acts, and may be considered to be impliedly repealed: *City and South London Ry. Co.* v. *London County Council* (1); *London County Council* v. *School Board for London.* (2) The learned magistrate thought himself bound by the case of *Charing Cross and Strand Electricity Supply Corporation* v. *Woodthorpe* (3); but the facts of that case were very different from those of the present case, and the decision was that the provisions of the particular private Act in that case were not so inconsistent with those of the general Act as to cause them to be repealed by implication. The question in each case is whether the provisions of the private Act are inconsistent with those of the earlier general Act: *Uckfield Rural Council* v. *Crowborough District Water Co.* (4); *London County Council* v. *Wandsworth and Putney Gas Co.* (5)

This particular building was, as is found by the magistrate, a necessary part of the alterations which the appellants were empowered to make by their private Act. It is, therefore, immaterial that it was not specially authorized by that Act.

The Dock Act of 1894 made provisions by ss. 19, 27, and 29, sub-s. 8, for preserving the rights of the local authority under the Metropolis Management Act, 1855, in certain cases, and the fact that no allusion is made to the general Act or to the

(1) [1891] 2 Q. B. 513.
(2) [1892] 2 Q. B. 606.
(3) (1903) 88 L. T. 772.
(4) [1899] 2 Q. B. 664.
(5) (1900) 82 L. T. 562.

local authority in the section authorizing these particular works shews that it was not the intention of the Legislature that the powers of the local authority should obtain in regard to them.

Avory, K.C. (*H. C. Biron* with him), for the respondents. Admitting that in each case the question is whether the provisions of the private Act and the general Act are inconsistent, there is no inconsistency here. This workshop was not a building specially authorized by the private Act to be built on a specified piece of land, as was the case in *City and South London Ry. Co.* v. *London County Council* (1) and *London County Council* v. *School Board for London.* (2) The cases which are really in point are *Charing Cross and Strand Electricity Supply Corporation* v. *Woodthorpe* (3) and *Whitechapel Board of Works* v. *Crow.* (4) The private Act here contains nothing inconsistent with the powers given by s. 76; there is no provision for the drainage of buildings to be erected, nor is there any special provision as to the erection of those buildings, nor does the private Act in authorizing these works contain any intimation that the provisions of s. 76 are not to apply.

Macmorran, K.C., replied.

Cur. adv. vult.

Feb. 1. The judgment of the Court (Lord Alverstone C.J., Lawrance and Kennedy JJ.) was read by

LORD ALVERSTONE C.J. This is a special case stated by Mr. Paul Taylor, one of the metropolitan magistrates, and raises a point of some importance under s. 76 of the Metropolis Management Act, 1855. The appellants are the Surrey Commercial Dock Company and the respondents are the corporation of Bermondsey, the successors of the vestry of Rotherhithe. The area of the appellants' docks is within the area of the borough. The appellants are a company incorporated under the Surrey Commercial Dock Act, 1864, for the purpose of carrying on the undertaking mentioned in s. 15 of that Act. The statute of 1864 does not contain any clause dealing

(1) [1891] 2 Q. B. 513.
(2) [1892] 2 Q. B. 606.
(3) 88 L. T. 772.
(4) (1901) 84 L. T. 595.

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specially with the Metropolis Management Act, unless it be s. 125, upon which no reliance was placed by the respondents. In the year 1894 the appellants obtained statutory power to make certain alterations in their dock premises, all of which were situated within the area of their undertaking, as defined by the Act of 1864; and by s. 4 of the Act of 1894 the company were authorized to make and maintain, among other works, "a new road (No. 1) and sewer commencing in Swing Bridge Road and terminating in Rotherhithe Lower Road, and the raising and alteration of the levels of Swing Bridge Road between the western end of the Swing Bridge and the commencement of such new road (No. 1) and sewer." This section in enumerating the particular works gave the company power, subject to the provision of the Act, to make and maintain all necessary and proper sewers, drains, culverts, buildings, yards, and other works, and to alter, break up, stop up, and divert any pipes, sewers, drains, and other works on or under any lands within the limits of deviation. The appellant company subsequently raised the level of the Swing Bridge, as they were empowered to do under this section, and constructed the new bridge, and this alteration involved the occupation of the site of certain buildings of the yard, among others a workshop for fitters. In consequence the appellants demolished the workshop for fitters and erected a new workshop upon another site within the ambit of their dock premises, such site, as the plans attached to the case shew, being wholly surrounded by docks. It was contended on behalf of the respondents that prior to the commencement of digging out the foundation of the new workshop it was incumbent upon the appellants to give notice to the respondents under s. 76 of the Metropolis Management Act, 1855, and that the foundations must be laid at such a level as would permit the drainage of the workshop in accordance with the Act, and as the respondents should order, and that any drain from the workshop must be constructed in accordance with the directions of the respondents under that section. It was contended on behalf of the appellants that, having regard to the statutory powers already referred to, it was not incumbent upon the

appellant company to give a notice under s. 76, but the power and responsibility of deciding as to any drains within the statutory area was vested in the appellant company, and that the respondents had no jurisdiction, at any rate so far as s. 76 was concerned, in that area. Beyond the sections to which we have already referred, no direct assistance can be gathered from any other sections; but it is not unimportant to observe that s. 19 requires notice to be given to the respondents where any work to be done, by virtue of the Act of 1894, may pass over, under, or by the side of, or interfere with, any sewer under their control; and s. 27 imposes restrictions with regard to the building line upon buildings erected upon land purchased by the company; and sub-s. 8 of s. 29 subjects any buildings erected or provided by them to the provisions of the Metropolis Building Act, 1855, and the Metropolis Management Act, 1855. The learned magistrate decided that the new workshop was a building within the meaning of s. 76; that it had been erected upon land belonging to the appellants within the limits of deviation shewn in the deposited plans referred to in s. 4 of the Act of 1894; but he held that the provisions of the Act of 1894 were not inconsistent with s. 76 of the Metropolis Management Act, 1855, and that, therefore, the appellants ought to have given notice.

The question appears to us to be one of considerable difficulty. In favour of the respondents it may be argued that the new workshop is not a work specially authorized by the Act of 1894, but is only consequential on the demolition of the old workshop necessitated by the alteration by the raising of the level of the Swing Bridge Road, and, if this be so, there does not seem to be any reason why the provisions of a general Act applicable to the area in which the proposed building is situated should not apply. Upon the other hand, it may be urged that the control of the respondents in the matter of foundations is inconsistent with the power and duty of the dock company properly to maintain the works within their area, and that the statute clearly contemplates that the duty of providing the necessary works, and of taking the proper precautions for their construction and maintenance,

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should rest with the dock company. In this view it would be inconsistent with this argument that the borough council should be able to deal with the question of the depth of foundations which might in some cases affect the stability of other works which the dock company were authorized and required to maintain. In favour of the appellants, the judgments in the *City and South London Ry. Co.* v. *London County Council* (1) were relied upon, and to a certain extent they are an authority in their favour; but they do not, however, seem to us to conclude the case altogether. That was a case in which the London County Council complained that a station erected by the City and South London Railway Company did not conform with the general building line. The Court of Queen's Bench and the Court of Appeal decided that the company were not bound by the provisions of the Metropolis Management Act in this respect, notwithstanding that the building could have been erected within the general line of buildings without any inconvenience except a considerable increase of expense. The Court of Appeal held that, if the buildings which the railway company were erecting were buildings necessary for the statutory purpose, it was not within the power of the county council to dictate the particular way in which the company should arrange their buildings, and how in particular they should construct them. That case cannot be regarded as a direct authority for the point raised in the present case, because, as we have already pointed out, the work here constructed was not a work expressly authorized, as in the *City and South London Case* (1), but it was only something which the company found it necessary to do in consequence of a building, previously existing, having been destroyed by the works specially authorized. It is, however, found by the learned magistrate in paragraph 12 of the case that the erection of the new building had been rendered necessary by the raising and alteration of the levels of the Swing Bridge Road authorized by s. 4 of the Act of 1894, and we are of opinion that the principle ought to be extended to this case. It seems to us

(1) [1891] 2 Q. B. 513.

that dealing with a statutory undertaking, as to which both the rights and the obligations are imposed by statute upon a particular body, express enactment or a clear implication is necessary in order to transfer the responsibility to a body acting under a general statute. We think also that to a certain extent the reference to the Metropolis Management Acts in the latter sections of the statute to which we have referred confirm this view. We, however, decide the case upon the broad principle that the interference and control involved in s. 76 of the Metropolis Management Act, 1855, is inconsistent with the powers conferred upon the appellants under their statutory authority. It was said that this view was contrary to the decision of this Court in *Charing Cross Electricity Supply Corporation* v. *Woodthorpe* (1), but when that case is examined this will not be found to be so. In that case a question arose as to notice being given to a number of public authorities, and it was argued that because a provisional order, confirmed by Act of Parliament, gave the Board of Trade and the Postmaster-General certain rights of control over the character of the structures, that excluded the necessity of complying with the provisions of the London Building Act, 1894. The Court decided in that case that the protection given to one class of the public by the control of those two authorities, namely, the Board of Trade and the Postmaster-General, ought not to deprive the public of the protection given to them by the London Building Act. That decision obviously in no way conflicts with the judgment which we are giving.

For the above reasons we are of opinion that the appeal should be allowed.

Appeal allowed.

Solicitors for appellants: *W. R. Millar & Sons.*

Solicitor for respondents: *Frederick Ryall.*

(1) 88 L. T. 772.

A. P. P. K.

C. A.
1904
Feb. 3.

[IN THE COURT OF APPEAL.]

SMITH *v.* THE ASSESSMENT COMMITTEE OF THE LEIGH UNION AND THE OVERSEERS OF THE TOWNSHIP OF LEIGH.

Poor Law—Appeal against Poor-rate—Assessment Committee as Respondents—Consent of Guardians—Notice of Meeting of Guardians—Union Assessment Committee Amendment Act, 1864 (27 & 28 *Vict. c.* 39), *s.* 2—*Divided Parishes and Poor Law Amendment Act*, 1882 (45 & 46 *Vict. c.* 58), *s.* 12.

Sect. 12 of the Divided Parishes and Poor Law Amendment Act, 1882, which enacts that where, under the Poor Law Amendment Act, 1834, or any of the Acts amending the same, the consent in writing of a majority of the guardians of a union is required it shall be deemed a sufficient compliance with such requirement if a resolution giving consent is passed at a meeting of the guardians, of which meeting, and of the business to be transacted thereat, not less than fourteen days' notice shall be given to each guardian, is confined to cases of statutory enactments by which the consent in writing of a majority of the guardians of a union is required, and a fourteen days' notice is not necessary of a meeting at which the consent of the guardians is to be asked, under s. 2 of the Union Assessment Committee Amendment Act, 1864, to the appearance of the assessment committee as respondents to an appeal against a poor-rate.

APPEAL from the judgment of the King's Bench Division on a special case stated by the Court of quarter sessions for the County Palatine of Lancaster.

The appeal was against a poor-rate for the parish of Leigh in the Leigh Union. When the appeal was called on for hearing before the Court of quarter sessions, counsel appeared on behalf of the assessment committee of the union. The overseers did not appear either in person or by counsel. Counsel on behalf of the appellant called on the counsel for the assessment committee to prove that the consent of the guardians to the appearance of the committee as respondents to the appeal had been duly obtained.

It was then proved or admitted that the notice of appeal had been served on the committee on March 11, 1903; that the clerk of the committee sent to each of the guardians a

notice, dated March 20, 1903, that at the next meeting of the guardians the consent of the board to the appearance of the committee as respondents in the appeal to quarter sessions would be proposed. This notice was of a meeting to be held on March 25, 1903, and at the meeting held on that day a resolution was passed giving the consent asked for.

It was contended by counsel for the assessment committee that the consent thus given was a sufficient compliance with s. 2 of the Union Assessment Committee Amendment Act, 1864 (27 & 28 Vict. c. 39), which enacts, with reference to any union to which the Union Assessment Committee Act, 1862, applies, that "The assessment committee of such union may, with the consent of the guardians of such union, after notice shall have been sent to every guardian, appear as respondents to such appeal," and further that the consent indicated by the section need not be in writing.

It was contended by counsel for the appellant that there had been no compliance with s. 12 of the Divided Parishes and Poor Law Amendment Act, 1882 (45 & 46 Vict. c. 58), which enacts that "where, under the Poor Law Amendment Act, 1834, or any of the Acts amending the same, the consent in writing of a majority of the guardians of a union or the managers of a school district is required, it shall be a sufficient compliance with such requirement if a resolution giving consent is passed at a meeting of the guardians or managers, of which meeting, and of the business to be transacted thereat, not less than fourteen days' notice shall be given to each guardian or manager." It was contended that the notice actually given, which was only four clear days, did not comply with this statute, and that, if the statute did not apply, the notice was not a reasonable notice, and that the notice being, on either of these grounds, insufficient, the consent given by the guardians at their meeting was invalid, and the assessment committee had no right to appear.

The Court of quarter sessions held that the objection must be sustained, and refused to hear counsel for the assessment committee on the merits of the appeal.

The appeal was allowed, but a case was stated for the

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opinion of the High Court in which the question for the Court was whether the Court of quarter sessions were right in refusing to hear counsel for the assessment committee.

Upon the argument in the Divisional Court before Lord Alverstone C.J., Lawrance J., and Kennedy J., it was held that the objection taken at quarter sessions to counsel for the assessment committee being heard could not be supported, and the order of the Court of quarter sessions was quashed, and the case remitted to the sessions to be heard and determined.

The appellant appealed.

A. T. Lawrence, K.C., and *Boyle, K.C.* (with them *W. Mackenzie*), in support of the appeal. The effect of s. 12 of the Divided Parishes Act, 1882, is that, whenever the circumstances are such that the consent of the guardians is requisite, the notice of the meeting at which the consent is to be asked for must be a fourteen days' notice. Under s. 23 of the Poor Law Amendment Act, 1834, the consent in writing of a majority of the guardians is required in certain specified cases. That is an exceptional case, but it is clear that s. 12 of the Divided Parishes Act must embrace something more than that single exceptional case, because the words are, "under the Poor Law Amendment Act, 1834, or any of the Acts amending the same." The Act cannot be treated as restricted to that particular case, but it is applicable wherever the consent of the guardians, indicated by a vote of a majority of those present at a meeting, is requisite. Under s. 38 of the Act of 1834 the guardians, except in certain cases which are specified in the section, can only act, by virtue of their office, at a meeting. At such a meeting the procedure is by resolution, passed by a majority of those present and voting, and recorded in a minute which is subsequently confirmed at the next meeting. If that process is duly carried out, there is the "consent of a majority of the guardians," for that must be taken to be equivalent to the consent of the guardians obtained by the ordinary process of a resolution passed at a meeting. The consent so obtained is in writing, namely, the minute of the resolution. The case is, therefore, brought

within the terms of s. 12 of the Divided Parishes Act, 1882, and it is necessary that there should have been fourteen days' notice of the meeting and of the intention to ask for the consent. The words of the section are that the consent must be required not "by the express words" of but "under" the Acts mentioned; and if the consent in writing of the guardians is required under any of those Acts it is to be a sufficient compliance with that requirement if the procedure indicated by the section is followed. That procedure was not followed in this case, for four days' notice only was given, and consequently the assessment committee did not obtain such a consent from the guardians as would entitle the former to appear as respondents in the appeal.

Ryde, for the respondents. Under the Act of 1834, apart from certain excepted things, the ordinary business of the guardians was done at a meeting by a majority of those present and voting. Under those circumstances the Act of 1864 was passed dealing with the ordinary consent of the guardians, and not with statutory requirements relating to consent in writing. The Act of 1882 deals only with the excepted cases, that is those in which the consent in writing of a majority of the guardians was required, and substitutes in those cases a resolution passed at a meeting. For those cases and those only it is provided that there must be fourteen days' notice of the meeting. It is a mistake to say that s. 23 of the Act of 1834 was the only instance of a statutory requirement of consent in writing by a majority of the guardians. There were other instances, some of which had been dealt with by special Acts, and the object of s. 12 of the Divided Parishes Act, 1882, was to deal generally with all the existing cases of that kind, and to substitute for the consent in writing a resolution of the majority of guardians at a meeting. (1) The consent required by s. 2 of the Union Assessment Committee Amendment Act, 1864, means either a consent however obtained, or else all the rules must be read in, and it means a consent arrived at by resolution of a majority, passed at a meeting

(1) See 12th Annual Report of the Local Government Board (1883), at pp. l, li.

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convened by the usual notice, and entered on the minutes. In either view the assessment committee duly obtained the consent of the guardians, and were entitled to appear as respondents to the appeal.

Lawrence, K.C., in reply.

COLLINS M.R. I have come to the conclusion that this appeal fails.

The point raised by the special case is—whether the assessment committee of the Leigh Union were entitled to appear at quarter sessions upon an appeal by a ratepayer against an assessment to a poor-rate. The Union Assessment Committee Amendment Act, 1864, deals with appeals against poor-rates, and provides by s. 2 that the assessment committee of a union "may, with the consent of the guardians of such union, after notice shall have been sent to every guardian, appear as respondents to such appeal." It is contended on behalf of the appellant that the assessment committee have not fulfilled the condition which would entitle them to appear as respondents because they have not duly obtained the consent of the guardians. To make that contention good, reference is made to s. 12 of the Divided Parishes and Poor Law Amendment Act, 1882, which enacts that "where, under the Poor Law Amendment Act, 1834, or any of the Acts amending the same, the consent in writing of a majority of the guardians of a union or the managers of a school district is required it shall be deemed a sufficient compliance with such requirement if a resolution giving consent is passed at a meeting of the guardians or managers, of which meeting, and of the business to be transacted thereat, not less than fourteen' days notice shall be given to each guardian or manager." That section in terms points to cases in which a consent in writing of a majority of the guardians of a union was necessary, and substitutes another provision for those that were applicable in such cases. Counsel for the appellant was obliged to contend that s. 2 of the Act of 1864 must be taken to mean that the consent to be given must be in writing, and that, because of the provisions of s. 12 of the Divided Parishes Act, 1882, which is said to govern the matter,

the assessment committee have failed to perform the condition precedent to their appearing at quarter sessions by obtaining, in lieu of such consent in writing, a resolution of the guardians at a meeting of which four days' notice was given. Sect. 2 of the Act of 1864 does not contain the words "in writing," and that fact creates the initial difficulty in the way of the appellant. Consent has certainly been given at a meeting of the guardians summoned for the purpose, and it is for the appellant to shew that it must of necessity be in writing, if the objection that less than fourteen days' notice of the meeting is to prevail. The argument in support of this view is that under the Poor Law Amendment Act of 1834 and subsequent Acts administering it the guardians cannot ordinarily act in their capacity of guardians except at a meeting, and then only under regulations which involve resolutions which are to be reduced into writing. So it is said if everything that is done by the guardians must, to have effect, be in writing, it must be taken that the consent required by s. 2 of the Act of 1864 must be a consent in writing. It seems an extraordinary way to arrive at the construction of an Act, not from anything contained in the Act itself, but from the machinery which is applicable to the working of the Act. The suggestion does not obtain support from the history of the legislation on this subject. Sect. 23 of the Poor Law Amendment Act, 1834, gave power to the Commissioners, "by and with the consent in writing of a majority of the guardians of any union," to order workhouses to be built, hired, altered or enlarged. That is an example of the special legislation dealt with in s. 12 of the Divided Parishes Act, 1882. There are provisions to be found in the same Act dealing with the special requirement of the consent in writing of all the guardians, as, for instance, ss. 33 and 34. There are thus a certain class of cases which involve a special consent; and such cases are entirely different from those in which, by the machinery which regulates procedure, the result of a consent in writing is arrived at. The matter does not stop there, for we have been referred to a report of the Local Government Board which shews that from time to time sections dealing with the special consent in writing of the

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majority of the guardians had been repealed, and that it was thought advisable that if any such sections remained unrepealed they should be dealt with generally and swept away. That is what has been done by s. 12 of the Divided Parishes Act, 1882, which points to such specific enactments in the Poor Law Amendment Act, 1834, or any of the Acts amending it, as might still exist, and not to a consent which merely under the machinery applicable to the case was in fact reduced into writing. Furthermore, the machinery which produces this result is applicable to the case of guardians present at a meeting and acting by a majority in giving the consent required by s. 2 of the Act of 1864, and a question arises whether that limited body comes within the description "a majority of the guardians of the union" in s. 12 of the Divided Parishes Act, 1882. The enactments appear to me to refer to different matters, but I prefer to rest my judgment upon broader grounds. I think that s. 12 of the Act of 1882 was directed to particular statutory enactments that imposed the obligation that the consent to be obtained was the consent in writing of the guardians, and the appellant has failed to shew that in the present case the condition precedent that the consent should be in writing has been imposed, so as to make the notice given in this case insufficient.

The appeal therefore fails.

ROMER L.J. The suggestion made on behalf of the appellant is—that the consent that the assessment committee must obtain under s. 2 of the Union Assessment Committee Amendment Act, 1864, is equivalent to or included in the consent in writing of a majority of the guardians, which is described in s. 12 of the Divided Parishes Act, 1882. With this suggestion I cannot agree. I think that the Legislature intended to limit the operation of that section to the cases therein expressly mentioned—that is, to cases in which, by some poor law statutory provision, the consent of the guardians had to be obtained in writing, and by a majority. I can see a reason for the Legislature providing that, in such a case, it should be deemed a sufficient compliance with such a statutory

provision that a resolution giving consent is passed at a meeting of guardians. There might be, and probably would be, great difficulty in obtaining the consent in writing of a majority of the guardians, and there would be a further difficulty in proving that it had been obtained. To meet these difficulties s. 12 of the Act of 1882 was passed, and not to deal with the ordinary cases in which the consent required was only that of the guardians. Such a consent is that of a majority of the guardians present at a meeting and voting, and it might not even be essential to obtain an absolute majority of the persons present, because, if the voting were equal, the chairman would have an extra or casting vote, and thus turn an equality of voting into a majority of votes. I cannot think that a resolution come to at a meeting, though put into writing and confirmed and signed by the chairman at the next meeting, can fairly be described as a consent in writing of a majority of the guardians of the union. If the first part of s. 12 of the Act of 1882, which deals with the consent in writing of a majority of the guardians, is compared with the later part, which speaks of a resolution passed at a meeting of guardians, there appears to be a contrast on the face of the section. The two expressions are clearly not used as equivalent, for the latter points to something different from and substituted for the former, and the provision is that the resolution is to be "deemed" a sufficient compliance with the requirement for which it is substituted. Lastly, if s. 12 had been intended to include all consents of guardians, it is a fair argument to say that the Legislature would have expressed that intention in so many words.

I agree, therefore, that the appeal fails.

MATHEW L.J. I am of the same opinion. On looking at s. 2 of the Act of 1864 two things strike one: first, that it is the consent of the guardians that is required, and not a word is said about that consent being in writing; and, secondly, that it would have been highly inconvenient had such a condition been imposed. We know from the history of poor law legislation that there was a time at which in certain cases

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the consent in writing of a majority of the guardians was required. We know, too, that this was found to be inconvenient, and it is clear that s. 12 of the Divided Parishes Act, 1882, was passed to remedy that inconvenience. It was sought to get away from such a limitation of the operation of the section by pointing out that in an ordinary case there would be a resolution which would be set out in a written minute. Such a result could only be obtained by reading into s. 12 a number of words to make it applicable to the ordinary meetings of guardians. It is sufficient to say that no such words can be found in the section. It has been suggested that the object of the section was to impose in general a minimum of fourteen days' notice; but it is apparent from the section itself that this limit of fourteen days was only intended to apply to matters that had previously required the written consent of a majority of the guardians.

The points raised for the appellant have failed, and the appeal must be dismissed.

Appeal dismissed.

Solicitor for appellant: *Frederick Kinch, for A. H. Hayward, Leigh.*

Solicitors for respondents: *Robbins, Billing & Co., for Marsh, Son & Calvert, Leigh.*

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1904
Feb. 4.

CHANDLER *v.* WEBSTER.

Contract—Impossibility of Performance—Money paid under Contract, whether Recoverable — Right accrued before Performance impossible — Failure of Consideration.

The defendant agreed to let to the plaintiff a room for the purpose of viewing the coronation procession of June 26, 1902, for the sum of 141*l.* 15*s.* The procession subsequently became impossible, owing to the illness of the King. By the terms of the contract the price of the room was payable before the time at which the procession became impossible. The plaintiff had paid 100*l.* on account of the price of the room, and the balance remained unpaid:—

Held, that the plaintiff was not entitled to recover the 100*l.* which he had paid, and that the defendant was entitled to payment of the balance, inasmuch as his right to that payment had accrued before the procession became impossible.

Appeal by the defendant, and cross-appeal by the plaintiff, from a judgment of Wright J. in an action tried by him without a jury.

The action was brought by the plaintiff to recover a sum of 100*l.* paid by him to the defendant as on a total failure of consideration, and the defendant counter-claimed for a sum of 41*l.* 15*s.*

It appeared that the defendant had agreed to let a room in Pall Mall to the plaintiff for the purpose of viewing the procession on the coronation of the King on June 26, 1902, at the price of 141*l.* 15*s.* A memorandum of the transaction sent by defendant to plaintiff was as follows: "To first-floor room and use of ante-room at back at 7, Pall Mall, W., to view the first coronation procession on June 26, 1902, 157*l.* 10*s.*, less 10 per cent. 15*l.* 15*s.*—141*l.* 15*s.*" The defendant repeatedly wrote to the plaintiff asserting that by the agreement the price of the room was immediately payable, and demanding payment of it. The plaintiff in a letter written on May 29, in answer to one of the defendant's letters, wrote, "there was really no fixed arrangement that cash was to be paid down, except that it was understood between us that the money should be obtained as

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quickly as possible"; but he never denied, in substance, that the price of the room was payable before the procession. The plaintiff had hired the room for the purpose of letting it to a customer, but, owing to the death of a relative, the customer did not ultimately want the room. On June 10, 1902, the plaintiff wrote a letter to the defendant in the following terms: "I beg to confirm my purchase of the first-floor room of the Electric Lighting Board at 7, Pall Mall, to view the procession on Thursday, June 26, for the sum of 141*l.* 15*s.*, which amount is now due. I shall be obliged if you will take the room on sale, and I authorize you to sell separate seats in the room, for which I will erect a stand. If the seats thus sold in the ordinary way of business do not realize the above amount by June 26, I agree to pay you the balance to make up such amount of 141*l.* 15*s.*"

On June 19 the plaintiff paid the defendant a sum of 100*l.* on account of the price of the room. Subsequently it became impossible that the procession should take place on account of the illness of the King.

Wright J. held that the plaintiff was not entitled to recover the 100*l.* which he had paid, and that, on the construction of the letter of June 10, it appeared that the balance was not payable until after the procession, and consequently the defendant was not entitled to recover on the counter-claim.

J. B. Matthews, for the defendant. The learned judge held, upon the construction of the plaintiff's letter of June 10, taken as a whole, that the obligation to pay did not arise till the procession took place, and therefore the balance of 41*l.* 15*s.* was not payable, inasmuch as the procession had become impossible. It is submitted that, on the true construction of the letter, it is an admission that the price of the room is then due and payable, coupled with a suggestion that the plaintiff should be allowed to endeavour to raise money in order to pay it in the manner specified in the letter. It is clear from the previous correspondence that the price of the room was by the contract payable immediately, or, at any rate, within a reasonable time from the making of the contract, and before the date when

the procession became impossible. The rule applicable to such cases was laid down by Channell J. in *Blakeley* v. *Muller & Co.* (1) in the following terms: "If the money was payable on some day subsequent to the abandonment of the procession, I do not think it could have been sued for. If, however, it was payable prior to the abandonment of the procession, the position would be the same as if it had been actually paid, and could not be recovered back, and it could be sued for." In *Civil Service Co-operative Society* v. *General Steam Navigation Co.* (2) Lord Halsbury L.C. expressed his entire concurrence with that passage in the judgment of Channell J. It follows that the plaintiff is bound to pay the balance of 41*l.* 15*s.*, and is not entitled to recover back the 100*l.* already paid. There is no foundation here for any suggestion that by the terms of the contract the happening of the procession was a condition precedent to the obligation to pay the price of the room, or that there was any understanding that the money was to be returned if the procession did not take place. [He also cited *Krell* v. *Henry* (3); *Taylor* v. *Caldwell* (4); *Appleby* v. *Myers* (5); *Clark* v. *Lindsay*. (6)]

Spencer Bower, K.C., and *Colam*, for the plaintiff. It is submitted that the construction put by the learned judge on the letter of June 10 was correct, and therefore the appeal must fail. With reference to the cross-appeal, it is submitted that this case is simply one of a total failure of consideration, and therefore the plaintiff is entitled to recover back the 100*l.* which he has paid, and a fortiori cannot be bound to pay the balance. The doctrine of *Taylor* v. *Caldwell* (4) does not apply to the circumstances of the present case. The consideration in this case for which the parties contracted was the use of a room from which the procession could be viewed, and, if there was no such procession, the whole consideration failed; and the plaintiff therefore was not bound to pay for the room, and, having paid part of the price, is entitled to recover it back. There is nothing really in the correspondence to shew that by

(1) [1903] 2 K. B. 760.
(2) [1903] 2 K. B. 756.
(3) [1903] 2 K. B. 740.
(4) (1863) 3 B. & S. 826.
(5) (1867) L. R. 2 C. P. 651.
(6) (1903) 88 L. T. 198.

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the terms of the contract the price of the room was payable before the procession had taken place. In cases like *Blakeley* v. *Muller & Co.* (1) and *Civil Service Co-operative Society* v. *General Steam Navigation Co.* (2), where expense had been incurred, or something had been done in the way of performance, by the party to whom the payment had been made, such as the erection of seats, or the fitting up of a ship specially, it could not be said that there was a total failure of consideration. There was nothing to shew here that the defendant had incurred any such expense. Those cases therefore are distinguishable from the present.

[They also cited *Knowles* v. *Bovill.* (3)]

J. B. Matthews, for the defendant, in reply.

COLLINS M.R. In this case the plaintiff agreed with the defendant for the hire of a room for the purpose of viewing the coronation procession. The price of the room was to be 141*l.* 15*s.* The plaintiff paid 100*l.* before the date fixed for the procession, leaving a balance of 41*l.* 15*s.* unpaid. The procession did not take place. The plaintiff thereupon brought an action to recover the 100*l.* which he had paid, and in that action the defendant counter-claimed for the unpaid balance of 41*l.* 15*s.* The learned judge decided that both the claim and the counter-claim failed; that the plaintiff was not entitled to recover back the 100*l.* paid by him, and the defendant was not entitled to be paid the balance of 41*l.* 15*s.* Against this decision both the parties appeal, the defendant's appeal being the first in date. He contends that in the event which happened, having regard to the terms of the contract, he is entitled to the balance of 41*l.* 15*s.* which the plaintiff has refused to pay him. I will deal with that appeal first. The question appears really to depend upon the terms of the contract made by the parties. Contracts in these cases arising out of the postponement of the coronation have formed the subject of several decisions; and it has been held that, in cases where the doctrine of *Taylor* v. *Caldwell* (4) applies, that

(1) [1903] 2 K. B. 760.
(2) [1903] 2 K. B. 756.
(3) (1870) 22 L. T. 70.
(4) 3 B. & S. 826.

is to say, where the parties have made no express stipulation that money paid for viewing the procession shall be returned in the event of no procession taking place, and where, under the circumstances of the contract, no condition to that effect can be implied, the result of the procession being prevented from taking place is that, the further performance of the contract having become impossible, the person who has paid his money in pursuance of it, on the footing of the contract being subsequently performed in full, must, nevertheless, abide the loss of what he has paid; and the person to whom a sum would have become payable on performance of the contract must also abide the loss, and cannot impose on the other party the obligation of paying that sum; in the event which has happened, the fulfilment of the contract having become impossible, both parties are relieved from further performance of it. The question is how the law so laid down is to be applied in the present case.

Dealing first with the defendant's counter-claim for the balance of 41*l.* 15*s.*, I think that, upon the authorities, it is clear that the defendant has a right to recover that balance, if the contract was that the price of the room should be paid before the time at which the procession became impossible. A person who has agreed to pay a sum of money cannot be in a better position by reason of his having failed to perform his obligation to pay it at the time when he ought to have done so, than that which he would have occupied if he had paid the money in accordance with the contract. If that be so, the question which we have to consider is whether the contract entered into bound the plaintiff to pay the price of the room before the date at which the procession became impossible. In my opinion it did so bind him, and it was not a condition precedent to his obligation to pay the money that the procession should take place. The terms of the contract are to be gathered from the correspondence between the parties. I need not refer to it in detail. It appears to me to be clear upon the correspondence that the understanding was that the 141*l.* 15*s.* for the use of the room was to be paid, either immediately, or, at any rate, as soon as possible after the

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making of the contract, and certainly before the date when the procession became impossible. The defendant repeatedly asserts in his letters that the money has become payable; and I do not find that the plaintiff substantially disputes that assertion in his answers further than by qualifying it to the extent of saying that there was no absolute bargain that the price should be paid down in cash immediately after the making of the contract; but I think that his qualification really amounts to an admission that it was payable before the time at which the procession became impossible. Great reliance was placed by the plaintiff's counsel upon the letter of June 10, upon which Wright J. decided the case, but it appears to me that that letter is really a clear admission by the plaintiff that the obligation to pay the money had already accrued. On that letter Wright J. seems to have come to the conclusion that the happening of the procession was made a condition precedent to the liability of the plaintiff to pay, and therefore that, as to the balance of 41*l.* 15*s.*, the plaintiff was not liable. For the reasons I have already given I do not think that was the true effect of the original contract, and the letter of June 10 appears to me to begin with a clear admission that the whole amount of 141*l.* 15*s.* was then due, and then to suggest, merely by way of indulgence to the plaintiff, that an opportunity should be given him of raising the money by letting seats in the room for the procession, without any waiver of the rights of the defendant under the original contract. That being so, in my opinion the application of the law, as established by the authorities which have been cited, to this case is clear. The fulfilment of the contract having become impossible through no fault of either party, the law leaves the parties where they were, and relieves them both from further performance of the contract. Therefore, if by the contract the obligation to pay for the room did not arise until after the procession had taken place, then, the obligation being based on the happening of the procession, which has become impossible, the hirer is relieved from that obligation; but if by the contract the obligation to pay for the room had accrued before the procession became impossible, the hirer,

if he has paid, cannot get his money back, and, if he has not paid, is still liable to pay. That being so, it appears to me that the defendant is entitled to succeed on the counter-claim.

Then, with regard to the plaintiff's claim for a return of the 100*l.*, to a very considerable extent I have already dealt incidentally with the considerations which apply to that claim. The plaintiff contends that he is entitled to recover the money which he has paid on the ground that there has been a total failure of consideration. He says that the condition on which he paid the money was that the procession should take place, and that, as it did not take place, there has been a total failure of consideration. That contention does no doubt raise a question of some difficulty, and one which has perplexed the Courts to a considerable extent in several cases. The principle on which it has been dealt with is that which was applied in *Taylor* v. *Caldwell* (1)—namely, that, where, from causes outside the volition of the parties, something which was the basis of, or essential to the fulfilment of, the contract, has become impossible, so that, from the time when the fact of that impossibility has been ascertained, the contract can no further be performed by either party, it remains a perfectly good contract up to that point, and everything previously done in pursuance of it must be treated as rightly done, but the parties are both discharged from further performance of it. If the effect were that the contract were wiped out altogether, no doubt the result would be that money paid under it would have to be repaid as on a failure of consideration. But that is not the effect of the doctrine; it only releases the parties from further performance of the contract. Therefore the doctrine of failure of consideration does not apply. The rule adopted by the Courts in such cases is I think to some extent an arbitrary one, the reason for its adoption being that it is really impossible in such cases to work out with any certainty what the rights of the parties in the event which has happened should be. Time has elapsed, and the position of both parties may have been more or less altered, and it is impossible to adjust or ascertain the rights of the parties with exactitude. That being so, the law treats

(1) 3 B. & S. 826.

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everything that has already been done in pursuance of the contract as validly done, but relieves the parties of further responsibility under it. In the case of *Blakeley* v. *Muller & Co.* (1) Wills J. in giving judgment made some valuable observations on this point. He said, with regard to the decision in *Appleby* v. *Myers* (2): "That decision is, in my opinion, distinctly in point. The argument for the plaintiffs must be that the contract was rescinded ab initio. There is no authority to warrant that contention, and I cannot think it is well founded. The process of constructing a hypothetical contract by supposing what terms the parties would have arrived at if they had contemplated the possibility of what was going to happen is, to my mind, very unsatisfactory. It is very difficult to construct such a contract for them. Probably, in the present case, the defendants would have stipulated for compensation for their outlay, and the plaintiffs for a return of their money; but it is impossible to say with any certainty what the result of their bargaining would have been." It seems to me that he there points out the reason why the Courts have been obliged to stop short where they have, namely, at the position of the parties when the further performance of the contract was excused for both, and why they have felt themselves constrained to adopt what appears to be a more or less arbitrary rule on the subject. I think the same principle has been adopted by the decision of this Court in *Civil Service Co-operative Society* v. *General Steam Navigation Co.* (3), where the Lord Chancellor approved of a passage from the judgment of Channell J. in the case of *Blakeley* v. *Muller & Co.* (4) In that passage the learned judge supports what I have already said, namely, that, where the doctrine of *Taylor* v. *Caldwell* (5) and *Appleby* v. *Myers* (2) applies, the result is that the law leaves the parties where they were when the further performance of the contract became impossible. It treats the contract as a good and subsisting contract with regard to things done and rights accrued in accordance with it up to that time; but, as

(1) [1903] 2 K. B. 760.
(2) L. R. 2 C. P. 651.
(3) [1903] 2 K. B. 756, at p. 764.
(4) [1903] 2 K. B. 760, at p. 762.
(5) 3 B. & S. 826.

the basis of the contract has failed, it excuses the parties from further responsibility under it. For these reasons I think the judgment was right as to the claim, but wrong as to the counter-claim. The appeal must therefore be allowed and the cross-appeal disallowed.

ROMER L.J. Although it is rather a hazardous task, I will venture to state the proposition which I conceive to be the result of the authorities with regard to the class of cases of which the present is one. Where there is an agreement which is based on the assumption by both parties that a certain event will in the future take place, and that event is the foundation of the contract, and, through no default by either party, and owing to circumstances which were not in the contemplation of the parties when the agreement was made, it happens that, before the time fixed for that event, it is ascertained that it cannot take place, the parties thenceforth are both free from any subsequent obligation cast upon them by the agreement; but, except in cases where the contract can be treated as rescinded ab initio, any payment previously made, and any legal right previously accrued according to the terms of the agreement will not be disturbed. The present case appears to me to come within that proposition. I think the agreement here was such that, when it turned out that the procession could not take place, the result was that both the parties were thenceforth free from all further obligations under the contract. In my opinion, it was not a contract which could then be treated as rescinded ab initio. That being so, any legal right which had previously accrued to either party remained in force, and for the reasons given by the Master of the Rolls, which I need not repeat, I think that one of those rights was that of the defendant to payment of the sum of 141*l.* 15*s.* in pursuance of the agreement. That being so, I agree that the appeal should be allowed and the cross-appeal dismissed.

MATHEW L.J. I am of the same opinion. I think it is clear from the correspondence that the sum of 141*l.* 15*s.* was

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by the terms of the original agreement to be paid shortly after the making of that agreement. The defendant in his letters again and again asserted that to be so, and the plaintiff really never once denied it. The plaintiff's letter of June 10 clearly admits the money to be then payable, but, as he cannot find the whole of the money at once, he requests to be allowed to endeavour to raise the balance by letting seats in the room for the procession. I do not think that there is anything in that letter to shew that the balance was not to be payable in the event of the procession not taking place. That being so, it seems to me clear on the authorities that the appeal of the defendant must succeed. With regard to the plaintiff's cross-appeal, similar considerations apply. I think the payment of the 100*l.* by the plaintiff was intended to be a final payment in pursuance of the contract, and I do not think such a payment can be recovered back, unless there was some condition express or implied in the contract providing for its return in the event which happened. In my opinion there is no ground for supposing in this case that there was any such condition, or that it was contemplated by either party that the money should be paid back if the procession did not take place.

Appeal allowed and cross-appeal dismissed.

Solicitors for plaintiff: *Phillips & Boyle.*
Solicitors for defendant: *Russell & Arnholz.*

E. L.

BLAKE *v.* MIDLAND RAILWAY COMPANY.

1904
Jan. 26.

Employer and Workman—Compensation—Agreement—Registration of Memorandum—Genuineness—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *Sched. II., s.* 8.

Sched. II., s. 8, of the Workmen's Compensation Act, 1897, provides that where the amount of compensation under the Act shall have been ascertained by agreement, a memorandum thereof shall be sent by any party interested to the registrar of the county court, who, "on being satisfied as to its genuineness," shall record it in a special register:—

Held, that the registrar could not refuse to record the memorandum merely because owing to altered circumstances the workman was no longer entitled to the amount of compensation fixed by the agreement, but that his only duty was to ascertain whether the memorandum accurately represented the agreement which had been entered into.

APPEAL from the county court of Derbyshire.

The applicant was a workman in the employment of the respondents, earning 25*s.* a week, and on January 24, 1902, he met with an accident in the course of his employment which totally incapacitated him from work up to February 23, 1903. During that period, by agreement with him, the respondents paid to him 12*s.* 7*d.* a week, being 50 per cent. of his weekly earnings before the accident, which was the maximum given by the Workmen's Compensation Act, 1897. On February 23, 1903, the applicant began work again for the respondents at 18*s.* a week, and from that time he received nothing from them by way of compensation. He claimed to receive 6*s.* 10*d.* a week, and negotiations took place for the payment of a lump sum to him in lieu of this.

The applicant then applied to file the memorandum of agreement under Sched. II., s. 8 (1), of the Workmen's Compensation

(1) By Sched. II., s. 8, of the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), "Where the amount of compensation under this Act shall have been ascertained . . . . by agreement, a memorandum thereof shall be sent . . . . by any party interested, to the registrar of the county court for the district in which any person entitled to such compensation resides, who shall . . . . on being satisfied as to its genuineness, record such memorandum in a special register without fee, and thereupon the said memorandum shall for all purposes be enforceable as a county court judgment."

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Act, 1897; but his application was refused by the county court judge on the ground that he found as a fact that on the applicant's resumption of work in February, 1903, he admitted that he was no longer entitled to 12*s.* 7*d.* a week mentioned in the proposed application, and claimed as compensation 6*s.* 10*d.* a week in addition to his 18*s.* wages, and opened negotiations with the company on that basis. The judge considered, therefore, that the memorandum at the present time was not applicable to the facts of the case, and that no agreement had been come to between the parties which was applicable to the present circumstances, and that the agreement was not genuine within the meaning of the rules.

S. T. Evans, K.C. (*Clement Edwards* with him), for the applicant. The county court judge was wrong in holding that this memorandum was not genuine. There was no suggestion that it did not accurately set out the agreement entered into between the applicant and his employers. That being so, the memorandum must be registered: Workmen's Compensation Act, 1897, Sched. I., s. 12; Sched. II., s. 8; Workmen's Compensation Rules, 1898, rr. 38, 39, 41, 42, 43, 45, and Forms 16 to 20.

The fact that owing to altered circumstances the agreement is inequitable as to the amount of compensation is immaterial. It is open to the employers at once to apply to the Court to have the amount of compensation reviewed; but the object of the Act is that where there has been an agreement between the employer and workman, a memorandum of that agreement should be registered without expense, and should then have the effect of a county court judgment. All that the registrar has to do is to satisfy himself that the memorandum is genuine, i.e., that it sets out accurately the agreement which has been come to.

There are no English authorities on the point, but it has been decided in Scotland: *Cammick* v. *Glasgow Iron and Steel Co., Ld.* (1) [He also referred to *Cochrane* v. *Traill* (2); *Field* v. *Longden*. (3)]

(1) (1901) 4 F. 198. (2) (1900) 3 F. 27.
(3) [1902] 1 K. B. 47.

J. D. Crawford, for the respondents. The judge has found as a fact that the applicant had admitted that the terms of the agreement were no longer applicable. He was therefore right in holding that it was not "genuine," and refusing to register it. The Court will not interfere with a finding of fact by the judge, where there is evidence on which he could so find.

Here it is plain that the original agreement had been rescinded by the conduct of the parties. By going to work at the weekly wage of 18*s.* a week the applicant shewed that he did not expect to obtain the full amount of compensation which had been paid to him up to that time.

The Act can only mean that a memorandum of an existing agreement should be registered, and cannot intend to oblige the registrar to record an agreement which has ceased to be operative. If the amount of compensation payable under the agreement is admittedly too much, the whole agreement is invalid and inequitable, and the registrar cannot be forced to record it.

S. T. Evans, K.C., was not called upon to reply.

WILLS J. In my opinion this case is free from all difficulty. No doubt all sorts of difficulties and objections have been suggested by the respondents' counsel; but I think that there is really nothing in them. The Act of Parliament is quite clear. An agreement has been come to, and the parties are entitled to have a memorandum of that agreement registered. It has been held that there is no limit of time within which this registration must take place.

It seems that the applicant applied to the county court to have a memorandum of the agreement registered, and the answer was that the agreement, which was made in 1902, was no longer applicable to the present circumstances. That is conceded; but is that fact any reason why the memorandum should not be recorded as representing the agreement which had been come to between the parties? If the memorandum of agreement is registered it becomes important, because it does away with the necessity for taking proceedings under the Act to ascertain the liability, and, until something further happens,

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the amount of compensation, and so saves the workman from unnecessary expense. It must be observed that the rules only require the Court to be satisfied that the memorandum of the agreement is genuine, not that the agreement itself is in force at the time it is registered. That is to say that the Court must be satisfied that the memorandum truthfully represents the agreement which has been come to between the parties.

In the present case there is no doubt that the memorandum correctly represents the agreement made in 1902, and I can see no obstacle to its being registered. It is contended for the respondents that it would work injustice to them. If I was satisfied of that I should be inclined to say that the Act did not mean to create any injustice, and I should try very hard to find an explanation of the rule which would not have that effect. But I think that there is no fear of any injustice being done here. Sched. II., s. 8, provides that the registrar of the county court, on being satisfied as to its genuineness, shall record the memorandum in a special register without fee, "and thereupon the said memorandum shall for all purposes be enforceable as a county court judgment." No doubt that gives the workman primâ facie the right to go to the Court and take out execution for the sum due under the agreement. But the proceedings of all Courts are always subject to the control of the Courts themselves, and if the Court sees that its process is being used for a dishonest or improper purpose it has an inherent jurisdiction to prevent such a thing from being done. An application, therefore, to the county court judge on the ground that to enforce the judgment would be inequitable as between the parties, and contrary to good faith and justice, would be certain to succeed. No doubt the question of the amount of compensation which ought under the altered circumstances to be paid by the employers to the workman might give the judge some trouble, but that is a kind of trouble which all judges have at times to take. If the respondents had come to a fresh agreement with the workman on his returning to work they would have been able to register a memorandum of that agreement, and there would be an end of the matter; but they have not done so, and it would I think be unjust to

deprive the workman of the benefit of the Act, and to leave him without any recorded memorandum on which he could take action. The question of quantum—of the amount of the compensation—is always open to review, and may be reconsidered by the Court at any time on the application of the employers, and, as my brother Kennedy has suggested, if a memorandum of the agreement had been recorded when it was first made, it would have had precisely the same effect and be open to precisely the same objections on the return of the workman to work, when it would be necessary for the employers to make an application to review the amount of the compensation to be paid under it. The difficulties, therefore, would not be insuperable. It seems to me that the only way in which this agreement could be said to have been put an end to would be by shewing that a new agreement had been entered into between the parties. Nothing short of that ought to prevent the workman from having the benefit of registering a memorandum of the existing agreement, for, as I have said, the difficulties will be exactly the same whether the memorandum is registered now or whether it had been registered when the agreement was first made. In my opinion the mistake that the county court judge has made is in confounding the registration of the memorandum with the registration of the agreement. He has to be satisfied that the record is correct, not that the agreement is applicable to the present circumstances; and when he is satisfied that the memorandum is genuine, the applicant is entitled to have it registered. I think, therefore, that this appeal must be allowed.

KENNEDY J. I entirely agree with what has been said by my brother Wills, and only desire to add a very few words. The case does not seem to me to present any difficulty. The Act provides for methods of agreement which are to save the cost of proceedings by arbitration, and for the official recording of those agreements. There is no stipulation as to the time within which the registration shall take place, and no objection can be taken to the application for registration except on the ground that the memorandum is not genuine. I think the

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county court judge misunderstood the meaning of that word "genuine." A judgment is no less "genuine" to-day than it was when it was given under different circumstances; and so a memorandum of agreement which was made really and purposely is not rendered less genuine because circumstances are altered. I think to hold that this memorandum is not genuine, because there has been a change of circumstances which make the exact fulfilment of the agreement recorded in the memorandum no longer equitable, is to give to the word "genuine" a sense which cannot be justified.

Form 16 in the rules made under the Act shews how carefully mistake is guarded against. It provides as follows:—

"In the matter of an agreement between A. B., of &c., and C. D. & Co., Ld., of &c.

"Be it remembered that on the day of personal injury was caused to the said A. B., of &c., who was a workman employed by C. D. & Co., Ld., of &c., in [*state nature of employment*] by accident arising out of and in the course of his employment:

"And that on the day of the following agreement was come to by and between the said A. B. and the said C. D. & Co., Ld., that is to say:

"[*Here set out copy of agreement.*]"

If that is so, the lapse of time has no effect on the genuineness of the memorandum which sets forth an agreement with a true date, and the judge had nothing to do but to register it. The enforceability of the agreement is quite a different matter, as, if circumstances have changed, proceedings can be taken immediately by the employers to review the terms of the agreement, and I should think that, if the workman sought to take proceedings upon it and enforce it as a judgment, they would be able to obtain a stay of proceedings upon terms, at any rate.

I think that, having regard to the relations of workmen and employers, it is not unreasonable, where an employer finds that a workman to whom he is paying compensation under an agreement is getting better and can take work, which makes

the original terms of agreement no longer applicable, to expect that the employer should himself apply to register the memorandum of agreement, and at once take steps to get its terms reviewed, so as to avoid a liability to pay more than, under the new circumstances, he ought to pay.

Speaking for myself, I cannot see any answer in law to the workman's claim to register the memorandum of agreement merely because, while new terms were under discussion but no new agreement had been made, the workman very properly accepted fresh work; and even if by reason of the memorandum having been registered the workman was able for a time until that agreement has been reviewed to enforce payment of the sum fixed by the old agreement, I cannot see that there is any real hardship, since the employers might themselves have registered the agreement and, if there has been a change of circumstances which justifies the modification of the agreement, have got it reviewed. The construction for which the respondents' counsel has contended would allow the employer to treat the agreement as lapsed, and keep the workman disputing with him as to the terms of a new agreement, so that the workman would have no agreement on which he could proceed. I should be very sorry to assent to the argument that in such a case the workman's proper course is to take proceedings de novo to obtain compensation.

In the present case it is not suggested that any fresh agreement had in fact been come to between the applicant and the respondents. The question had only been discussed. The respondents have not chosen either to get the memorandum of the original agreement recorded or to make a new agreement with the workman; and I think that no injustice will be done to them by the registration of this memorandum.

Appeal allowed. Leave to appeal refused.

Solicitors for applicant: *Dubois & Williams, for Flint & Son, Derby.*

Solicitors for respondents: *Beale & Co.*

A. P. P. K.

C. A.
1904
Feb. 16.

[IN THE COURT OF APPEAL.]

GRIFFIN *v.* THE HOULDER LINE, LIMITED.

Employer and Workman—Compensation—Seaman—Employment on a Ship in a Dock—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *ss.* 1, 7 —*Factory and Workshop Act*, 1901 (1 *Edw.* 7, *c.* 22), *s.* 104.

While a ship was at a buoy in a dock, a seaman belonging to her was employed, as part of his ordinary duty, in clearing out a hold for the reception of cargo. In the course of that employment an accident caused personal injury to him which resulted in his death. On an application for compensation under the Workmen's Compensation Act, 1897, the county court judge held that he had no jurisdiction to award compensation. On appeal:—

Held, by Collins M.R. and Cozens-Hardy L.J., Mathew L.J. dissenting, that the deceased being, at the time of the accident, on a ship in a dock, was employed in a factory, and, there being no words in the Act expressly excluding seamen from its operation, the case fell within the provisions of the Act, and the application was well founded.

APPEAL by the applicant from the decision of the judge of the City of London Court dismissing an application for an award of compensation under the Workmen's Compensation Act, 1897.

From a statement of facts agreed upon by the parties it appeared that the applicant was the widow and administratrix of E. L. Griffin, deceased, who was a seaman. In November, 1902, he signed articles at Liverpool to serve on board a steamship belonging to the respondents, the Houlder Line, Limited, as an able seaman, upon a voyage from Liverpool, where the ship was lying, to the River Plate and back to this country. He duly joined the ship, and sailed in her from Liverpool to Newport, Monmouth, at which port the vessel called to take in bunker coal for the voyage. The vessel arrived at the Alexandra Dock, Newport, and when she had finished receiving her bunker coal she was moved out to the buoys in the docks preparatory to proceeding to sea. While she was at a buoy in the dock, and while the deceased was engaged in clearing up No. 5 hold, a heavy piece of wood was knocked over by a fellow-servant of the deceased, and inflicted upon him injuries which resulted in his death.

The county court judge was of opinion that the deceased was at the time of the accident working as a sailor, and that the Act was not applicable to such a case. He therefore refused to make an award of compensation.

The applicant appealed.

1904. Jan. 12. *Robson, K.C.*, and *G. A. Scott*, in support of the appeal. The Employers and Workmen Act, 1875, by s. 13 excludes seamen from the operation of the Act, but no such exclusion is contained in the Workmen's Compensation Act, 1897. One employment to which s. 1 of that Act refers is an employment in a factory, and by s. 104 of the Factory and Workshop Act, 1901, a dock is a factory, and a person having the actual use of a berth in a dock is an "undertaker": *Raine* v. *Jobson* (1); so that primâ facie the deceased was engaged in an employment to which the Act of 1897 applies. It is true that the Lord Chancellor in that case spoke of the intention of the Legislature not to deal in that statute with the relation between shipowners and sailors; but his remark was limited to sailors "when engaged upon their ordinary occupation of sailing upon the seas." As to the employers in this case, there is nothing to put shipowners and ship repairers in a different position; and as to the employed, the Act applies when a sailor is in a position in which any other workman would come within the Act. The underlying idea of the statute is that the place at which an accident happens determines whether the employment is brought within the statute.

[They cited *Merrill* v. *Wilson* (2), *Cattermole* v. *Atlantic Transport Co.* (3), and *Bartell* v. *W. Gray & Co.* (4)]

Carver, K.C., and *Dawson Miller*, for the respondents. The Act is by its terms not an unlimited Act applying to all workmen, but is limited to certain classes. It would have been easy to include expressly the class of seamen had it been desired to do so. The non-inclusion of a class working under such special circumstances as seamen ought to be conclusive

(1) [1901] A. C. 404.
(2) [1901] 1 K. B. 35.
(3) [1902] 1 K. B. 204.
(4) [1902] 1 K. B. 225.

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that it was not intended to include them. The deceased was engaged in the ordinary employment of a seaman under a contract to serve in that capacity, and not on anything ordinarily incidental to work in a factory. So, too, the owners, if they were occupying the dock or part of it, were not doing so for the purposes of a factory, but for purposes of navigation. They were mere wayfarers, not occupying any part of a wharf or any dry dock. They were merely in transit; and it would be straining the provisions of the Act to make it apply to ships passing through the dock.

[They cited *Francis* v. *Turner Brothers*. (1)]

Robson, K.C., in reply.

Cur. adv. vult.

1904. Feb. 16. COLLINS M.R. read the following judgment:—I agree with the judgment about to be read by Cozens-Hardy L.J., but, as we are not unanimous, I will state my opinion in my own words.

The question is whether a sailor who met with an accident while engaged in clearing out the hold preparatory to receiving cargo in a ship which was lying at anchor in a dock can sue the owners of the ship under the Workmen's Compensation Act. The county court judge has decided that he cannot, on the broad ground that the Act does not apply to sailors. It is not contended that there is any provision expressly excluding sailors from the Act. The question, therefore, must be, Do they come within the class of persons to whom the Act gives a remedy?

Sect. 1 of the Act provides as follows: "If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the first schedule to this Act." Therefore the applicant must be a workman, and the employment must be one to which the Act applies. By s. 7, sub-s. 2, "workman" is defined as including "every person who is engaged in an employment to

(1) [1900] 1 Q. B. 478.

which this Act applies, whether by way of manual labour or otherwise, and whether his agreement is one of service or apprenticeship or otherwise, and is expressed or implied, is oral or in writing." By sub-s. 1 of s. 7, "this Act shall apply only to employment by the undertakers as hereinafter defined on or in or about a . . . . factory." And by sub-s. 2, "undertakers" in the case of a factory means the occupier; and by the Factory Act, 1901, s. 104, "the person having the actual use or occupation of a dock . . . . or of any premises within the same or forming part thereof . . . . shall be deemed to be the occupier of a factory." It was once thought that, as the Act does not in terms constitute a ship a factory, employment in a ship in a dock was not employment in a factory, and the inference was also drawn that, as ships were not made factories, the Act was not intended to include sailors. The House of Lords, however, held in *Raine* v. *Jobson* (1) that a workman employed in a ship which was in a dock was employed in a factory. The fact that he was employed in a ship did not negative his being employed in a factory. Therefore, if the exclusion of sailors from the Act is rested on the fact that employment in a ship cannot be employment in a factory, the foundation for such contention is destroyed by that case. This Court has applied the principle of *Raine* v. *Jobson* (1) to more than one case in which workmen sent by their employers to do painter's or joiner's work on a ship in a dock have been held to be within the Act and to be entitled to compensation against their employers as the undertakers—i.e., the users or occupiers of a dock within the above definition. Unless, therefore, there be some special exclusion of sailors from the Act, a sailor clearing out a hold on a ship in dock is precisely in the same position to claim compensation against his employer as he would be if instead of being a sailor he had been a coal-heaver working in a coal-bunker and his master had been a coal-merchant instead of the owner of the ship. But there is no such exclusion to be found in the Act. The foundation for such suggestion, as I have pointed out, fails; and a sailor when employed as a workman on a

(1) [1901] A. C. 404.

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ship in a dock is just as much drawn within the Act as any handicraftsman under the same circumstances. His position, of course, while at sea is quite different; he must get himself physically into a factory before he can get the benefit of the Act. The difference of his position at sea is pointed out by Lords Halsbury and Shand in the case cited. It seems to me, therefore, that the authority of *Raine* v. *Jobson* (1) concludes this case, and that the appeal must be allowed.

MATHEW L.J. read the following judgment:—I regret to be unable to deal with this appeal from the point of view of my learned colleagues. I think that the county court judge was right in his decision that the appellant was not entitled to compensation under the Workmen's Compensation Act for the loss of her husband. The material facts are these. The deceased man had joined the respondents' ship, the *Royston Grange*, at Liverpool, under signed articles which bound him to serve the defendants as an able seaman on a round voyage to the River Plate and back to a home port. The vessel went from Liverpool to the Alexandra Dock, Newport, to take in her bunker coal, and, when the coaling was completed, she was moved out to buoys in the dock preparatory to proceeding to sea. While the ship was there the deceased man was employed in what was admitted to be the ordinary duty of a seaman, namely, in clearing up No. 5 hold for the reception of cargo. The accident to which his death was due occurred while he was so engaged.

The learned county court judge came to the conclusion that the deceased was not protected by the Act, and that the claim of his widow for compensation failed. Upon the argument of the appeal it was not disputed that, if the accident had occurred while the ship was at sea, the widow could not have maintained her right to compensation. But it was argued that the legislation embodied in the Factory Act, 1901, had altered the status of seamen on board when the vessel was not at sea and was lying in dock. The ship, it was said, while in dock was occupying part of a factory, and the sailors therefore

(1) [1901] A. C. 404.

were employed in a factory and were protected by the Workmen's Compensation Act. In support of this contention reliance was placed on the provisions of the Factory Act, 1901, and the judgment of the House of Lords in *Raine* v. *Jobson*. (1) But I am unable to discover either in the statute or in the decision of the House of Lords any indication of an intention to extend the Workmen's Compensation Act to a class which had not been previously included in that statute. Full effect may be given to the Factory Act and the decision, if both are treated as applicable to the class of workmen with which the Workmen's Compensation Act was clearly intended to deal—namely, workmen as distinguished from seamen. The argument for the appellant would lead to this extraordinary and, as it seems to me, unreasonable result—that a seaman while at sea would be outside the operation of the Act, but would become entitled to protection when in a position of comparative safety. I can see no reason for thinking that such a result could have been intended as the consequence of the application of the provisions of the Act of 1901 to the Workmen's Compensation Act. Further, I consider it unlikely that any change would have been made in the law which would affect existing as well as future contracts with seamen without a clear intimation to shipowners of their altered position. I am of opinion that the appeal should be dismissed.

COZENS-HARDY L.J. read the following judgment:—The applicant is the administratrix of E. L. Griffin, an able seaman on board the respondents' steamship *Royston Grange*. On her voyage from Liverpool to the River Plate the vessel proceeded to Newport to take in bunker coal. She arrived in the Alexandra Dock on November 24, and at midnight on November 28 she had finished receiving her bunker coal and was moved out to the buoys in the dock preparatory to proceeding to sea on the following morning. While there, in the discharge of his duties as a seaman, Griffin met with an accident which resulted in his death. The learned county court judge has held that as the deceased was a sailor, working

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as a sailor, he was not within the Act. By s. 7 of the Act the term " workman " includes every person who is engaged in the employments to which the Act applies, whether by way of manual labour or otherwise. The Act applies only to employment by undertakers as defined in the Act, including (inter alia) employment in or on or about a factory, and " factory " includes a dock, and the undertaker of a factory is the occupier thereof. Now it is clear that a ship, as such, is not a factory within the meaning of the Act, but I think it must be admitted, since the decision in the House of Lords of *Raine* v. *Jobson* (1) and the decision in this Court of *Bartell* v. *W. Gray & Co.* (2), that a ship occupying a berth in a dock occupies part of a factory, with the result that the vessel in question was within the operation of the Act, and the shipowners were undertakers within the Act at the time when the accident happened. Unless, therefore, there are some words to be found expressly excluding seamen, as such, from the benefit of the Act, I think that the applicant must succeed. I can find nothing to put seamen in a worse position than would be any carpenter, painter, or other mechanic on board a ship while in dock. The observations of Lord Halsbury and of Lord Shand in *Raine* v. *Jobson* (1), to the effect that it was not within the contemplation of the statute to deal with the relations between shipowners and sailors when engaged in their occupation of sailing upon the seas, do not seem to apply where the vessel is not at sea, but where, within the meaning of the statute, it is lying in and occupying part of a factory. In my opinion, this appeal must be allowed

Appeal allowed.

Solicitors for applicant: *Burn & Berridge.*

Solicitors for employers: *William A. Crump & Son.*

(1) [1901] A. C. 404. (2) [1902] 1 K. B. 225.

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1903
Dec. 19.
1904
Jan. 13.

BARRETT *v.* KEMP BROTHERS.

Employer and Workman — Compensation — Factory — Wharf — Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 2.

Every wharf is a factory within the meaning of the Workmen's Compensation Act, 1897, whether any provision of the Factory Acts is applied to it or not.

Hall v. *Snowden, Hubbard & Co.*, [1899] 2 Q. B. 136, is impliedly overruled by *Raine* v. *Jobson & Co.*, [1901] A. C. 404.

APPEAL from the decision of the judge of the Sittingbourne County Court upon an application for compensation under the Workmen's Compensation Act, 1897.

The applicant was a workman in the employment of the respondents, a firm of builders and contractors, who occupied a wharf on the river Medway, of which they were the lessees, and which was used by them for loading and unloading materials for use by them in their business. The wharf, upon which there was no machinery or plant, could be used by any member of the public upon payment of wharfage charges to the respondents. At a distance of about 250 yards from the wharf ran a public highway, and from the latter a private road, about twelve feet wide, ran to the wharf, and no farther; the respondents were lessees and occupiers of the private road as well as of the wharf. At the point where the private road ran into the public highway there was a gate seven feet high upon which the name of the respondents was painted, and which was always kept locked except when the private road was actually being used by the respondents, who kept the key of the gate. The private road was bordered on each side by a hedge, and the wharf was separated from the adjoining land (except the private road) by hedges. At the time of the accident the applicant was employed on the private road, at a point about thirty or forty yards from the public highway, in breaking stones for the repair of the private road, when a fragment of stone flew into one of his eyes, causing loss of the

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sight of that eye; he had never been employed on the wharf itself. After the accident the respondents sent notice of its occurrence to the inspector of factories for the district. At the hearing of the application for compensation it was admitted that, if the wharf was a factory within the meaning of s. 7 of the Workmen's Compensation Act, 1897, the respondents were undertakers within the meaning of that Act. The county court judge found that at the time of the accident the applicant was employed on, in, or about the wharf, and that the wharf was a factory within the meaning of s. 7; he accordingly made an award of compensation in favour of the applicant. The respondents appealed.

G. A. Scott, for the respondents. First, the wharf was not a factory within the meaning of s. 7, sub-s. 2, of the Workmen's Compensation Act, 1897. Every wharf is not a factory within that Act; the words "to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895," limit the generality of the term "wharf": *Hall* v. *Snowden, Hubbard & Co.* (1); and there was no evidence that any provision of the Factory and Workshop Act, 1901, was applied to this wharf, the provisions of s. 104 of which Act are for this purpose the same as those of the repealed Acts. It is true that the wharf might have been let for hire to any member of the public, but there was no evidence that the factory inspector had any right to go there for the purpose of inspection, nor was there any evidence of the employment of persons on the wharf in such a manner as to bring it within the provisions as to inspection.

[COLLINS M.R. In *Raine* v. *Jobson* (2) the House of Lords treated every dock as a factory, irrespective of the question of whether any of the provisions of the Factory Acts were applied to it; and a wharf stands on the same footing as a dock.]

It is submitted that that was not the effect of that decision. It is true that in argument it seems to have been admitted that every dock was a factory within the Act of 1897, but the decision stops short of adopting that admission; the case in

(1) [1899] 2 Q. B. 136. (2) [1901] A. C. 404.

effect decides that the particular dock was a factory, and that ship repairers who had hired the dock for the purpose of repairing a ship were occupiers of the dock within the Act. *Hall* v. *Snowden, Hubbard & Co.* (1) is not overruled by *Raine* v. *Jobson & Co.* (2)

Secondly, assuming the wharf to be a factory, there is no evidence that the employment of the applicant was on, in, or about a factory; the question is one of propinquity or proximity, and employment 220 yards from a wharf cannot be employment on, in, or about it. [On this point he cited *Powell* v. *Brown* (3); *Fenn* v. *Miller.* (4)]

Cecil Walsh, for the applicant, was not called upon to argue.

Cur. adv. vult.

1904. Jan. 13. COLLINS M.R. This is an appeal from the decision of a county court judge holding the applicant entitled to an award of compensation under the Workmen's Compensation Act, 1897. The applicant had received injury while at work upon a road within the curtilage of a wharf belonging to the employers, and two questions were raised before the county court judge—first, whether, having regard to the proved or admitted facts, the wharf was a factory within the meaning of the Act; and, secondly, whether, assuming it to be so, the employment was "on, in, or about" a factory, both which questions he answered in the affirmative. [The Master of the Rolls stated the facts above set out, and proceeded:—]

We took time for our judgment, in order that we might fully consider the true bearing of the decision of the House of Lords in *Raine* v. *Jobson* (2) upon the previous decision of this Court in *Hall* v. *Snowden, Hubbard & Co.* (1) When the decision of the House of Lords is carefully looked at, it seems clear that their judgment must be taken to have overruled our decision in *Hall* v. *Snowden, Hubbard & Co.* (1) It is true that *Raine* v. *Jobson* (2) was not argued upon the question which was

(1) [1899] 2 Q. B. 136.
(2) [1901] A. C. 404.
(3) [1899] 1 Q. B. 157.
(4) [1900] 1 Q. B. 788.

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argued in *Hall* v. *Snowden, Hubbard & Co.* (1), and that the decision of the House of Lords was based upon an admission made by counsel in argument that by the combined effect of the Workmen's Compensation Act, 1897, and the Factory and Workshop Act, 1895, every dock was absolutely and without qualification a factory for the purposes of the Act, whether any provision of the Factory Acts was applied to it or not. That admission formed the basis of the judgment of the House of Lords, and they held the dock to be a factory without any evidence whether any special provisions of the Factory Acts, though they might be applicable, had been applied to it. Of course no admission on the part of counsel can alter the law; the responsibility of acting on such an admission is the responsibility of the Court, and a decision based on the admission is the decision of the Court; and the result of the case, in my opinion, is that the House of Lords decided that a dock was a factory irrespective of the question whether any of the provisions of the Factory Acts were applied to it. That is a decision adverse to the decision of this Court in *Hall* v. *Snowden, Hubbard & Co.* (1), and we should be wanting in the proper respect due to the decisions of the House of Lords if we were to deal with it on any different footing. The true grounds of the decision in *Hall* v. *Snowden, Hubbard & Co.* (1) were not examined in the judgments of the House of Lords, and although I am aware that that decision has not been approved in Scotland (2) (where the same point has arisen), and that it has been criticised in the text-books on the subject, I have not yet seen any answer to the argument of Mr. Bray in that case, namely, that, in defining a factory for the purposes of the Workmen's Compensation Act, 1897, the Legislature has not said that every dock and wharf is to be a factory; it has said something very different, namely, that those docks and wharves to which the provisions of the Factory Acts are applied are to be considered factories, thereby presumably recognising the fact that some docks and wharves might not be factories. The observations made by some of the learned judges in Scotland, and by text-

(1) [1899] 2 Q. B. 136. (2) See *Strain* v. *Sloan & Co.*, (1901) 3 F. 663.

writers on the subject, seem to ignore altogether the primâ facie limitation placed on the definition of dock and wharf as factories; that limitation seems to be treated as if it did not exist. However, as I have said, the point is now concluded by the decision of the House of Lords. It is unnecessary to go into the merits of the second point further than to say that the decision of the county court judge was perfectly right: the place where the accident happened was (assuming the wharf to be a factory) certainly on, in, or about the wharf, for it was within the curtilage of the wharf; there was, therefore, abundant evidence to support the learned judge's finding.

MATHEW L.J. I am of the same opinion for the same reasons.

COZENS-HARDY L.J. I agree.

Appeal dismissed.

Solicitor for applicant: *F. J. Berryman, for W. A. Watson, Chatham.*

Solicitors for employers: *Smiles & Co.*

W. J. B.

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Dec. 9, 10.

GARBUTT *v.* DURHAM JOINT COMMITTEE.

Police—Pension—"Approved Service"—Continuity of Service—Police Act, 1890 (53 & 54 Vict. c. 45), s. 1.

By s. 1 (*a*) of the Police Act, 1890, a constable in a police force who has completed not less than twenty-five years' approved service is entitled to a pension on retirement. A constable served in the same police force for three periods amounting in the whole to upwards of twenty-five years; between the periods were breaks of about four months and two months respectively, caused in each instance by the constable's resignation from, and reinstatement in, the force:—

Held, that the period of approved service to count for a pension must be continuous service, and that the constable was therefore not entitled to a pension on retirement.

CASE stated by quarter sessions for the county of Durham upon an application by the appellant by way of appeal under s. 11 of the Police Act, 1890, against the refusal of the respondents to order payment of a pension to him under that Act.

At the hearing of the application the appellant relied upon a certificate of approved service for upwards of twenty-five years, which was produced to the Court, and which (save for the following objection to it) was admitted to be a certificate duly given under the Act and to refer to the appellant.

The respondents contended that the certificate, though "sufficient evidence," was not conclusive, and tendered evidence to the effect that the services of the appellant during the period had not in fact been diligent and faithful service, and contended that the certificate related to the period of service and was not conclusive evidence, and that the acting chief constable could not certify as to character, which appeared from the police records, and that the joint committee were entitled to exercise their discretion as to granting or withholding a pension on the ground of misconduct. The appellant contended that it was not open to the respondents to contest the certificate, and that such evidence was therefore inadmissible. On this point the Court of quarter sessions

agreed with the contention of the appellant, and refused to receive evidence as to the appellant's character.

The respondents further contended that upon the true construction of the Act it was necessary that the whole period of service of twenty-five years should be continuous in order to entitle the appellant to a pension in respect thereof. The appellant contended that the period need not be continuous, and further contended that, even so, the certificate of approved service once given precluded the respondents from raising this point. The Court of quarter sessions considered that the Act required that the whole period should be continuous, and inasmuch as the certificate shewed on its face that there had been two breaks in the period of service, they considered that it was open to the respondents to raise this point. They accordingly dismissed the application of the appellant.

The questions for the opinion of the Court were: (1.) whether the Court of quarter sessions was right in dismissing the application on the ground stated; and (2.) whether they were right in rejecting the evidence tendered on behalf of the respondents.

The certificate signed by the acting chief constable was headed, "Return of service of Police Constable Thomas P. Garbutt, recommended for an ordinary pension." It shewed (inter alia) that he joined the force on September 7, 1876, and resigned on April 30, 1881, a period of 4 years, 236 days; that he was reinstated on August 27, 1881, and was called on to resign on February 9, 1889, a period of 7 years, 167 days; and that he was again reinstated on April 1, 1889, from which date he served until his final retirement for 13 years, 61 days, making a total approved service of 25 years, 99 days; he was placed in the long and faithful service class on March 1, 1897. The certificate went on to certify that "the term of approved service entered above has been diligent and faithful service within the meaning of s. 4 of the Police Act, 1890."

Pickersgill (*Simey* with him), for the appellant. The appellant is entitled to his pension under s. 1 (*a*) of the Police Act, 1890, as having completed not less than twenty-five years'

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approved service. Approved service need not necessarily be continuous service. The certificate of the acting chief constable, shewing an approved service of twenty-five years and ninety-nine days, is conclusive. Sect. 4, sub-s. 1, provides that service reckoning for pension is to be subject to deductions authorized by the regulations, and "approved service" is to mean the period of service after allowing for such deductions as may be certified under the order of the police authority to have been diligent and faithful service; by sub-s. 2 the certificate of the chief officer of the force is made sufficient evidence of the period of approved service.

[LORD ALVERSTONE C.J. The certificate shews a break on the face of it: resignation, followed four months later by reinstatement.]

The fact of reinstatement is important. Reinstatement is different from mere reappointment; it obliterates the intervening period and puts the constable in his original position; it unifies the periods of service before and after the break. The joint committee rely on s. 4, sub-s. 5, which, in the case of a constable belonging to the army reserve who is called out for training or service, provides that on returning to the force he may reckon any approved service which he was previously entitled to reckon; but it is not the proper inference that in no case can the period of approved service before a break be taken into consideration on return to the force without express statutory provision to that effect. The same remark applies to s. 5, sub-s. 5, which deals specially with the mode of reckoning the pensions of constables who retire through incapacity for duty, but subsequently rejoin the force. In any case, the appellant relies on s. 30, sub-s. 8, which provides that in the case of any "existing constable" his approved service for any period before the commencement of the Act in the force in which he is serving at the time of his retirement is to be reckoned as approved service. Further, the respondents by their own acts have bound themselves to treat the appellant's service as approved service, especially by their advancement of him in 1897 (as appears on the face of the certificate) to the long and faithful service class.

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Shearman, K.C. (*Meynell* with him), for the respondents. The service of a constable, in order to count as approved service for a pension, must be continuous service; all the indications afforded by the Act of 1890 lead to that inference. Under s. 4, which deals with reckoning of service for pension, certain deductions of time (which in their working are purely automatic) may be made, but the constable still remains in the service; the only deductions allowed are in respect of sickness, misconduct, and neglect of duty; the necessary inference is that if a constable resigns or is dismissed, the period of service prior to his resignation or dismissal ceases to be service to be counted for a pension; in other words, service is the time during which the constable is actually on the list of the force, with a liability of course to the ordinary deductions. Sect. 4, sub-s. 5, says in plain terms that if a constable who is in the army reserve is called out for training or permanent service and subsequently returns to the police force, the break is not to affect the mode of reckoning the length of his approved service; the irresistible inference is that other breaks will affect it. The provisions of these sub-sections and of s. 5, sub-ss. 4, 5, are useless, if the service need not in ordinary cases be continuous. Under s. 21, where a constable who has not been dismissed leaves a police force without a pension, the police authority have power to return him the rateable deductions made from his pay, and this supports the view of the respondents. The certificate itself is only "sufficient" evidence of its contents—it is not conclusive. The chief constable only certifies the actual periods of service; the period of "approved service" must be certified under the order of the police authority, which is in this case the standing joint committee, and not by the acting chief constable. It is true that in *Walker* v. *Simpson* (1) the Privy Council held that, where two periods of service were separated by a break, the service entitling to a pension need not be continuous; but that decision depended upon the provisions of the New South Wales Civil Service Act, 1884, and affords no guide to the construction of the present Act.

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Pickersgill, in reply. The certificate is conclusive, and complies with the requirements of s. 4, the service being certified "under the order of" the police authority by the acting chief constable.

Cur. adv. vult.

Dec. 10. LORD ALVERSTONE C.J. This case raises a question which is not free from difficulty, and which should be placed beyond doubt by legislative enactment or other amending regulation. I have, however, come to the conclusion upon the construction of the section that the approved service which is necessary to entitle a constable to a pension must be continuous, and not broken, service; and in the view which I take the other difficulties which have been suggested in argument do not arise. In the present case we have not before us any certificate or order of the police authority under s. 4, sub-s. 1, of the Act of 1890; we have only a certificate of the chief officer under s. 4, sub-s. 2, which, as appears from that sub-section, was intended to be sufficient evidence of the length of approved service in a particular force. It is unnecessary for us to express any opinion as to the effect of a certificate of a police authority, or as to whether the statements in it are conclusive or may be contradicted; we are dealing only with the certificate of the acting chief constable under sub-s. 2. This document shews a period of service amounting in the whole to twenty-five years and ninety-nine days, but divided into three periods. There was a break of four months in 1881, when the appellant resigned his appointment as a first class constable and was reinstated as a second class constable, and for the purposes of our present decision it must be taken (indeed it is not denied) that this was a voluntary resignation. In February, 1889, he seems to have been called upon to resign, and two months afterwards was reinstated as a second class constable; there were, therefore, two breaks in the period of service. The question for us is whether under this Act continuous service is necessary, or whether different periods of service separated by breaks may be added together to make up the prescribed length of approved service. The mere enact-

ment of a qualifying length of service does not of itself indicate that the total may not be made up of different periods, or that the service in respect of which the pension is granted must be continuous; that was the view of the Privy Council in *Walker* v. *Simpson* (1)—a view in which, although not strictly binding upon this Court, I entirely concur. We have, however, to construe the language of this particular Act, and in my opinion the service contemplated by it must be continuous, otherwise many of the provisions of the Act itself would be unnecessary.

Turning to s. 1 of the Act, we find in sub-ss. (*a*) and (*b*) that a constable is entitled to retire (without or with a medical certificate as the case may be) if he has completed not less than twenty-five (or fifteen) years' approved service; this provision does not of itself decide the question, for though the language points in the direction of a period of continuous service, such a construction might be easily rebutted by other provisions in the Act. What light can we obtain from the rest of the Act? Sect. 4, sub-s. 1, makes the service of a constable subject to deductions in respect of sickness, misconduct or neglect of duty, and defines "approved service" as meaning for the purposes of the Act such service as may after such deductions be certified under the order of the police authority to have been diligent and faithful service. That section, I think, rather supports the view of the respondents; it mentions sickness, &c., as a ground for deductions with reference to a period when the constable is, so to speak, serving in the force; but it is possible to divide the total service into periods and make the necessary deduction from each, so that the various periods, when added together, make up the necessary twenty-five years; the section therefore is not conclusive. Sub-s. 4 of s. 4 does not touch the question; it was necessary to enable the periods of service in two separate police forces to be added together, for without it a period of service in one force would not be continuous with a period of service in another. Sub-s. 5, which deals with constables belonging to the army reserve, need not have been inserted if it was intended that all the broken periods

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of service should be added together to make up the necessary term. That sub-section gives the constable, who is a member of the army reserve to the knowledge of the police authority or the chief police officer, the right to reckon the period of approved service which he is entitled to reckon before being called out for training in conjunction with that which he may be entitled to after returning to the police force at the end of his training. If there was ever a case where absence ought not to constitute a break in the service, one would imagine it would be in the case of a constable called out for training in the army reserve; but the provisions of this sub-section point clearly to the conclusion that apart from express provisions the two periods could not be united to form the period of approved service. Then again the provisions of s. 5, sub-s. 5, in the case of constables rejoining the force after being incapacitated for service would seem to be unnecessary if the argument for the appellant is correct; the sub-section specially provides that, except in certain cases, the provisions as to retirement, pensions, &c., are to apply as though the constable had not retired. It is a strong thing in the face of such statutory provisions to say that, if a constable chooses to absent himself for a time, he can make up the necessary length of qualified service by adding together the different periods during which he has been serving in the force. Reference has also been made to s. 21, which gives a police authority power to return rateable deductions made from pay where a constable etires from the force without a pension or gratuity, with a proviso that the section is not to apply where he is removed to another force under circumstances that will enable him to reckon his approved service in the force from which he removes; it is contended that, if a constable does not claim repayment of deductions under this section, he ought to be allowed to add the periods of approved service in both forces so as to make up the requisite period. The section is not at all conclusive of the question, nor do I think that any very strong inference is to be drawn from it, but on the whole I think that it supports the view that the periods of service must be continuous. I think, therefore, that the decision

of quarter sessions was right, and that this appeal must be dismissed.

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LAWRANCE J. I am of the same opinion. Reading either s. 1 or s. 4 separately, I cannot say that they are inconsistent with the argument that the periods of service may be added together to make up the required period, but a consideration of the whole Act leads me to the conclusion that the service must be continuous.

KENNEDY J. It is a strange and unfortunate fact that the Legislature in passing this important statute has left it to the administrators of the law to infer indirectly from the language of the sections what is obviously a most important part of the scheme—that is, whether the right of a police constable to a pension is to depend upon his service having been continuous and uninterrupted, or whether, as was held upon a New South Wales statute in *Walker* v. *Simpson* (1), the total period of service may be made up of various terms with interruptions or breaks between them. I confess to feeling a great deal more doubt than my learned brethren as to the right inference to be drawn from the language used by the Legislature. I hope that in construing this Act it is not unreasonable for me to say that, as we are admittedly driven to interpret it by inferences drawn from various scattered sections, the decision to which we are constrained to come cannot enhance the attractions of a service the well-being and popularity of which are of the highest importance to the community at large. I approach the question with the feeling that if a constable has served with credit for twenty-five years (and in saying this I am expressing no opinion as to the merits of this particular case), but has for a short time left the service and has then been invited to return and has returned, such a case can hardly be treated as though the first period, say ten years, of faithful service were not to form part of the term of service necessary to entitle him to a pension. I am pressed by the feeling that the view which ought to be taken is that expressed by the

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Privy Council in *Walker* v. *Simpson* (1)—that primâ facie if a constable has served for twenty-five years he is entitled to his pension, and that it is for those who assert the contrary to prove their contention; it would have been a simple thing for the Legislature to have used the expression "continuous service" if they had intended that it should be a condition of the right to a pension, and the absence of any such phrase affords an inference of which the counsel for the appellant has quite properly made use. I think, however, that, in order to construe s. 1 properly, we must have regard to the whole of the Act, and if we find distinct provisions which are incapable of a satisfactory construction except upon the basis that the Legislature had in view a period of continuous service, we must give that effect to the Act. I agree with my Lord that the provisions of s. 4, sub-s. 5, and of s. 5, sub-s. 5, do not seem capable of a satisfactory explanation unless continuous service is to be taken as the basis of the Act; and, though I feel great doubt upon the matter, I am not prepared to dissent from the view expressed by the other members of the Court.

Appeal dismissed. Leave to appeal.

Solicitors for appellant: *Bell, Brodrick & Gray, for Geipel, West Hartlepool.*

Solicitors for respondents: *Maude & Tunnicliffe, for Simey, Son & Iliff, Sunderland.*

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W. J. B.

LORD LUDLOW *v.* PIKE.

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Feb. 23.

Landlord and Tenant—Tithe Rent-charge—Agreement by Tenant to repay amount of to Landlord — Validity of Agreement — Tithe Act, 1891 (54 & 55 *Vict. c.* 8), *s.* 1, *sub-s.* 1.

Sect. 1, sub-s. 1, of the Tithe Act, 1891, which provides that "any contract made between an occupier and owner of lands after the passing of this Act for the payment of the tithe rent-charge by the occupier shall be void," prohibits not only a contract by the occupier to pay the tithe rent-charge directly to the tithe owner, but also a contract to reimburse the landlord such sums as shall be paid by him for tithe rent-charge.

POINT of law raised on the pleadings.

By an agreement in writing dated December 31, 1897, the then Lord Ludlow, the predecessor of the plaintiff, let a farm to the defendant upon a tenancy from year to year "at the yearly rent of 235*l.*, and also by way of further rent so much as the landlord shall pay for tithe rent-charge on the said premises." The defendant from time to time down to Michaelmas, 1903, paid to the landlord under the said agreement the sums which the landlord paid for tithe rent-charge. At Michaelmas, 1903, he tendered to the plaintiff the sum of 117*l.* 10*s.* in full discharge of the half-year's rent then fallen due, and declined to pay the further sum of 9*l.* 11*s.* 9*d.* claimed by the plaintiff as having been paid by him for tithe rent-charge. The plaintiff refused the tender, and brought his action for 127*l.* 1*s.* 9*d.* The defendant paid into court the 117*l.* 10*s.*, and as to the balance pleaded the Tithe Act, 1891. (1)

Foote, K.C., *C. A. Garland*, and *Foa*, for the plaintiff. The effect of s. 1, sub-s. 1, of the Tithe Act, 1891, is not to avoid a contract by the tenant to reimburse to the landlord

(1) By the Tithe Act, 1891, s. 1, sub-s. 1, "Tithe rent-charge as defined by this Act issuing out of any lands shall be payable by the owner of the lands, notwithstanding any contract between him and the occupier of such lands, and any contract made between an occupier and owner of lands, after the passing of this Act, for the payment of the tithe rent-charge by the occupier shall be void."

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the amount paid by him for tithe. Before 1891 there was no personal liability on any one to pay the tithe; it was levied by distress. The Act imposed an obligation to pay it upon the landlord; but the object of the Act in so doing was only to improve the procedure, to remove the apparent injustice of allowing the goods of a Nonconformist farmer being seized for the purpose of supporting a Church to which he did not belong; it was not intended to affect the relations between the farmer and his landlord. The words in s. 1, sub-s. 1, "for the payment of the tithe rent-charge," mean for the payment of it "to the tithe owner." In *Davies* v. *Fitton* (1) Lord St. Leonards, dealing with the Irish Act of 2 & 3 Will. 4, c. 119, which by s. 13 provided that, in all cases where any land was let after the passing of the Act, the lessee should hold the land free from the payment of tithe, "and all contracts, covenants, and agreements to the contrary hereof, howsoever made, shall be utterly null and void," observed at p. 234 that the landlord "may, notwithstanding the statute, by contract, get a rent equivalent both to the old rent and the tithe"; and at p. 236 he added that an agreement by the tenant "to pay 100*l.* a year rent, and in consideration of the tithe rent-charge an additional sum of 5*l.* a year," would be valid and enforceable.

[CHANNELL J. But he did not say that an agreement to pay an increase of rent equal to the varying amount of the tax could be enforced.]

The Lord Chancellor was there dealing with the distinction between an agreement to pay the tithe direct to the tithe owner and an agreement to reimburse the landlord by a payment of additional rent; he was not contrasting an agreement to pay an increased rent of a fixed amount with one of a varying amount. If an agreement to transfer the burden indirectly to the tenant's shoulders would be good in the one case, it must equally be good in the other. In *Colbron* v. *Travers* (2) it was held that, notwithstanding the provisions of the Income Tax Acts, an agreement in a lease made in 1807 that the rent should be reduced by the amount of 10*l.* in

(1) (1842) 2 D. & War. 225. (2) (1862) 31 L. J. (C.P.) 257.

the event of the income tax being repealed, and should be increased again by a similar amount in the event of the tax being reimposed, was valid. It may be that the Court would there have held that an agreement that the rent should rise and fall by an amount varying with the amount of the property tax would have been void. But in the Income Tax Act there is an express prohibition of an agreement to pay the rent in full, whereas in the Tithe Act there is no corresponding prohibition of an agreement to reimburse the landlord.

Moyses, for the defendant, was not called upon.

CHANNELL J. What I have to determine in this case is whether the words of the Tithe Act, 1891, prohibit the contract which the plaintiff seeks to enforce. Sect. 1, sub-s. 1, provides that "any contract made between an occupier and owner of lands . . . . for the payment of tithe rent-charge by the occupier shall be void." It is suggested on behalf of the plaintiff that that was only intended to apply to a contract by the tenant to pay the tithe directly to the tithe owner, and not to a contract to reimburse the landlord the sum paid by him in respect of tithe. The agreement here is to pay by way of rent a sum equal to the amount of the tithe. The effect of that is to put the burden of the tithe upon the tenant, giving him upon the one hand the benefit of any reduction in the amount if the price of corn should fall, and on the other hand imposing on him an increased burden if the price of corn should rise. I confess I do not quite see why the Legislature should have prohibited a contract of this kind. What is apparently the main object of the Act might well have been effected without that prohibition. But it is sometimes convenient to make an enactment wider than is absolutely necessary in order to make quite sure that the particular object in view shall be attained. But whatever the reason may have been the prohibition is there. The words of the section are plain, and, in my opinion, this contract clearly comes within them. Then, with regard to the authorities, I think the case of *Davies* v. *Fitton* (1) is a distinct authority against Mr. Foote's contention. There Lord

(1) 2 D. & War. 225.

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St. Leonards says (1): "If a lease be granted, subject to a gross rent with a collateral covenant by the tenant to pay the tithe rent-charge, that agreement would be void under the statute. But suppose an agreement of this nature—the tenant offers to pay 100*l.* a year rent, and in consideration of the tithe rent-charge an additional sum of 5*l.* a year, and this offer is accepted by the landlord. If this Court were called upon to carry into execution such an agreement, could it refuse to do so? I certainly can see nothing to prevent its doing so." It seems to me that the distinction which he is there drawing is between an agreement to pay the exact amount of the tithe, and an agreement to pay a fixed sum assessed by the parties themselves as compensation to the landlord for having to pay the tithe. It is suggested that he is not there dealing with an agreement to reimburse the landlord. But if we look at the earlier part of the judgment it will be seen that that suggestion is ill founded. At p. 234 the Lord Chancellor, after saying that independently of the statute 2 & 3 Will. 4, c. 119, the tenant was bound to pay the tithe, says: "But the effect of the statute was to place the matter on a different footing; it provided that no tenant, except under the peculiar circumstances mentioned in the Act, should be liable to pay this demand, and transferred the liability to the landlord . . . .; on the other hand, however, the Act does not prevent the landlord saying, 'I must have a greater rent than I formerly received, in consequence of the new obligation imposed on me by this statute'; every man may take the largest rent people will give him. He may, notwithstanding the statute, by contract get a rent equivalent both to the old rent and the tithe." That is, no doubt, getting somewhere near Mr. Foote's contention; but he goes on: "But this contract must be construed having regard to the enactments of the statute." And he then adds, with reference to the provisions, in certain draft leases which had been prepared but not executed, for the payment by the tenant of the tithe, "I apprehend these provisions would have been void"; and it appears from p. 226 that the provisions that he was referring to were as follows: "Yielding and paying

(1) 2 D. & War. at p. 236.

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the amount of tithe to said R. Hedges Eyre" (the landlord), "his heirs and assigns, or to such proper authorities as may by Act or Acts of Parliament be duly authorized to receive the said tithe property": from which it is clear that in his opinion an agreement to pay the amount of the tithe to the landlord would be void just as much as an agreement to pay the tithe direct to the tithe owner. My judgment must be for the defendant.

Judgment for the defendant.

Solicitors for plaintiff: *Rowcliffes, Rawle & Co.*
Solicitor for defendant: *A. T. Rossiter.*

J. F. C.

ASTON TUBE WORKS, LIMITED *v.* DUMBELL AND ANOTHER.

1904
Jan. 15.

County Court—Costs—Action sent for Trial in County Court—Order XIV.*—Payment into Court of Part of Claim as Condition of Leave to Defend—Judgment for Defendant in County Court—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 65, 107, 113—*County Court Rules, Order* IX., *r.* 12; *Order* LIII., *r.* 18.

An action founded on contract having been brought in the High Court for 71*l.*, the plaintiffs took out a summons for judgment under Order XIV., and an order was made giving the defendants leave to defend on paying 23*l.* into court within seven days, otherwise final judgment for that sum, with liberty to defend as to the residue of the plaintiffs' claim. The defendants paid the 23*l.* into court within the seven days; and, the action having been sent for trial in the county court under s. 65 of the County Courts Act, 1888, the defendants gave notice to the plaintiffs, more than five clear days before the day appointed for the hearing, that they consented to judgment for the 23*l.* At the hearing the county court judge gave judgment for the defendants as to the residue of the claim, with costs from the date of their notice consenting to judgment for 23*l.*:—

Held, that the defendants were entitled to costs from the date of their notice consenting to judgment, and that those costs ought to be taxed according to Scale C of the county court scales of costs, being the scale applicable "where the subject-matter or sum recovered exceeds 50*l.*"

APPEAL by the plaintiffs, and cross-appeal by the defendants, from a decision of the judge of the Wolverhampton County Court.

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The plaintiffs brought an action in the High Court for 71*l.*, the price of goods alleged to have been sold and delivered to the defendants. The writ, specially indorsed, was issued out of the district registry, and on a summons for judgment under Order XIV. the district registrar made an order "that on payment into court by the defendants of the sum of 23*l.* within seven days from the date hereof the defendants be at liberty to defend the action; otherwise final judgment for the plaintiffs against the defendants for that amount and costs to be taxed, with liberty to defend as to the residue of the plaintiffs' claim." The defendants paid 23*l.* into court within seven days from the date of that order. Subsequently, on February 27, 1903, an order was made under s. 65 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), that the action be tried in the Wolverhampton County Court. The plaintiffs thereupon lodged the original writ, and the order for trial in the county court, with the registrar of that court, and he appointed a day, March 27, 1903, for the trial. On March 5, 1903, the defendants gave the plaintiffs notice that they consented to have judgment against them for the 23*l.* paid into court. At the trial the defendants succeeded in their defence in respect of the residue of the plaintiffs' claim, and the judge gave judgment for the defendants with costs from the date of their notice consenting to judgment for the 23*l.*, the plaintiffs to have the 23*l.* with costs up to the same date. On taxation the defendants brought in their bill of costs incurred from the date of their notice consenting to judgment for 23*l.*, the bill being made out according to Scale C of the higher scale of costs in force in county courts, which is applicable "where the subject-matter or the sum recovered exceeds 50*l.*" The registrar taxed the bill according to Scale C. Upon the hearing of an application to the county court judge for a review of taxation he decided that the defendants were entitled to costs, but that the 23*l.* which the plaintiffs had recovered in the action should be deducted from the total amount (71*l.*) claimed, and therefore that the defendants, having succeeded in respect of a sum less than 50*l.*, were only entitled to costs on Scale B, which is applicable "where the subject-matter or the sum recovered exceeds 20*l.* and does not exceed 50*l.*"

The defendants appealed from this decision so far as it allowed costs on Scale B only; and there was a cross-appeal by the plaintiffs against the allowance of any costs to the defendants.

Disturnal, for the defendants. The county court judge was wrong in holding that Scale B applied; the defendants are entitled to costs according to Scale C. Sect. 65 of the County Courts Act, 1888, under which section this case was sent for trial in the county court, provides that, on the case being entered in the county court, "the action and all proceedings therein shall be tried and taken in such Court as if the action had been originally commenced therein; and the costs of the parties in respect of proceedings subsequent to the order of the judge of the High Court shall be allowed according to the scale of costs for the time being in use in the county courts, and the costs of the order and all proceedings previously thereto shall be allowed according to the scale of costs for the time being in use in the Supreme Court." The county court judge, therefore, had no discretion as to the scale on which the costs should be taxed: that depended upon whether the defendants had succeeded in resisting a claim for over 50*l*. Sect. 107 provides that the defendant may, in any action or matter, within such time as shall be prescribed, pay money into court in satisfaction of the plaintiff's demand; and, if the plaintiff elects to proceed and recovers no more than has been paid into court, he shall pay the defendant's costs incurred after the payment in. By Order IX., r. 12, sub-r. 1, of the County Court Rules, a defendant who desires to pay money into court pursuant to s. 107 of the Act shall pay the same five clear days at least before the return day, and every such payment shall be taken to admit pro tanto the claim or cause of action or complaint in respect of which the payment is made, unless the defendant at the same time files a notice denying liability. By s. 113 of the Act, "All the costs of any action or matter in the Court, not herein otherwise provided for, shall be paid by or apportioned between the parties in such manner as the Court shall think just, and in default of any special direction shall

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abide the event of the action or matter." The defendants' costs here are so otherwise provided for. By Order LIII., r. 18, "Where the costs of a defendant are being taxed the word 'recovered,' wherever it appears in the scale, shall be deemed to be 'claimed.'" Here the sum claimed in the action was 71*l.*, and the defendants have had judgment in their favour as to the residue of the claim. The payment into court does not make the action a new action, though it does raise a new issue, namely, whether the 23*l.* was sufficient to satisfy the plaintiffs' claim. The defendants succeeded on that issue, which was the only issue tried, and are entitled to costs upon Scale C having regard to the whole amount claimed by the plaintiffs.

McCardie, for the plaintiffs. As to the defendants' appeal, where an action is sent for trial in the county court under s. 65 of the County Courts Act, 1888, and judgment for part of the claim has been obtained under Order XIV., the action remains one action; the whole of it is transferred to the county court: *White* v. *Headland's Patent Electric Storage Battery Co.* (1) Here the plaintiffs have brought their action for 71*l.*, and have obtained judgment in that action for 23*l.* The defendants, therefore, if they are entitled to any costs at all, are only entitled to them upon Scale B, having succeeded only in respect of a sum exceeding 20*l.*, but not exceeding 50*l.*

As to the plaintiffs' appeal, the defendants are not entitled to any costs at all. The county court judge had no power to give them costs. In *Andrew* v. *Grove* (2), which is the converse case to this, it was held that a county court judge had no power to order a successful defendant to pay the plaintiffs' costs. The decision in *Wright & Son* v. *Bull* (3) is directly in point, except that in that case the county court judge had made no order for costs. But the judges of the Divisional Court (Ridley and Darling JJ.) expressed a clear opinion that the county court judge had no power to give the defendant any costs where judgment for part of the claim had been given

(1) [1899] 1 Q. B. 507. (2) [1902] 1 K. B. 625.
(3) [1900] 2 Q. B. 124.

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in the High Court under Order XIV., and, the action having been sent for trial in the county court, the defendant succeeded as to the rest of the claim. They took the view that, as the discretion of the judge was, by s. 113 of the County Courts Act, 1888, limited to costs "not herein otherwise provided for," he had no power to deal with such costs as are dealt with by the general scheme of the Act; that the general scheme of the Act in this respect was that, in the absence of a special direction, costs should abide the event, and that the "event" was clearly the recovery by the plaintiff of the sum for which he had obtained judgment under Order XIV.

Order IX., r. 12, of the County Court Rules as to payment into court does not apply, because there has been no payment into court by the defendants under the County Courts Act and Rules. The payment into court was made by the defendants, not in pursuance of the Act and rules, but as a condition of leave to defend. Order IX., r. 12, of the rules provides that a defendant may pay into court five clear days before the return day, and notice of the payment into court is to be given to the plaintiff. Those conditions have not been complied with here, and the defendants are not entitled to the benefit as to costs which a compliance might have conferred upon them. There is no provision in the County Courts Act or Rules equivalent to Order XXII., r. 11, of the Rules of the Supreme Court, and the defendants could not, therefore, turn the payment into court under Order XIV., which he had to make as a condition of leave to defend, into a payment under the County Courts Act and Rules. The county court judge, therefore, had no power to treat the 23*l.* as having been paid into court in satisfaction, and to give the defendants their costs of the trial.

Disturnal was not called on to reply.

LORD ALVERSTONE C.J. Two important points are raised by the appeal and cross-appeal in this case. The first is whether the defendants, who have succeeded, except as to 23*l.*, in an action brought against them for 71*l.*, and have obtained

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an order for their costs, incurred after they consented to judgment for the 23*l.*, which they had brought into court under an order made under Order XIV., are entitled to costs on Scale B or Scale C of the scale of costs in use for the time being in the county court—that is, whether they are to be treated as having succeeded in respect of a claim exceeding 50*l.* or in respect of a claim exceeding 20*l.*, but not exceeding 50*l.* The registrar taxed on Scale C; there was an application to the county court judge for a review of taxation; he decided that Scale B was applicable, and the defendants appeal from his decision. Now I agree that the result of the authorities is that the action remains one action after the order sending it for trial in the county court, and various consequences were pointed out in argument as following from that. For the plaintiffs it was argued, from *White* v. *Headland's Patent Electric Storage Battery Co.* (1), that the plaintiffs having recovered 23*l.* in the action for 71*l.*, the defendants could not be entitled to costs on the scale applicable where more than 50*l.* has been recovered or claimed. In *White* v. *Headland's Patent Electric Storage Battery Co.* (1) an action was brought in the High Court for 73*l.* An order was made under Order XIV. giving the plaintiff leave to sign judgment for 53*l.*, and giving the defendants leave to defend as to the residue, and it was ordered, under s. 65 of the County Courts Act, 1888, that the action should be sent for trial to the county court. The plaintiff signed judgment for the 53*l.*, and at the trial in the county court he got judgment for the residue of his claim with costs. The Court of Appeal held that he was entitled to have his costs in the county court taxed according to Scale C. Now, assuming that the result of the trial in the county court had been the other way, which is the state of things in the case before us, it could not, I think, have been successfully contended that the defendants were only entitled to costs on Scale B. Here the defendants, having brought into court a sum which they say is sufficient to satisfy the plaintiffs' claim, and being willing to submit to judgment for that sum and

(1) [1899] 1 Q. B. 507.

costs, the plaintiffs say it is not enough, and seek to recover the whole 71*l.*, the contest between them being whether or not the plaintiffs are entitled to any more than they have got. Order LIII., r. 18, of the County Court Rules provides that where the costs of a defendant are being taxed, the word "recovered," wherever it occurs in the scale, shall be deemed to be "claimed." Applying that rule to the decision in *White* v. *Headland's Patent Electric Storage Battery Co.* (1), namely, that the action is one action, I think it is clear that Scale C is the scale applicable here, being the scale which applies to the amount originally claimed by the plaintiffs. If the plaintiffs had recovered the whole of their claim they would clearly have been entitled to have their costs taxed upon Scale C, and I think it would be a great injustice if the defendants, who have succeeded as to the residue of the claim, were not also entitled to taxation upon Scale C, the scale of costs applicable being determined, so far as they are concerned, by the amount which the plaintiffs claim. I am, therefore, of opinion that the defendants' appeal should be allowed.

The second question, which arises on the plaintiffs' appeal, is whether the defendants are entitled to any costs at all. It was argued that, as the defendants had paid the 23*l.* into court under an order of the High Court made under Order XIV., the payment could not be treated as a payment into court to which the County Court Act and Rules applied, and the county court judge, therefore, had no power so to treat it, and to give the defendants their costs. But the county court procedure is intended to deal with substance and not with form. There are no pleadings in the county court, and where the money is in court, and the defendant gives notice to the plaintiff that he may take it out in satisfaction of his claim, that is just as good a payment into court as it would be in the High Court if the provisions of Order XXII. of the High Court Rules were complied with. It was also contended that the defendants were not entitled to any costs on the ground stated in dicta of Ridley J. and Darling J. in *Wright & Son* v. *Bull.* (2) In that case the

(1) [1899] 1 Q. B. 507. (2) [1900] 2 Q. B. 124.

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action was brought in the High Court for 20*l.* 2*s.*, and leave was given to the plaintiffs, under Order XIV., to sign judgment for 8*l.* 14*s.* if that sum was not paid within seven days. The defendant had leave to defend as to the residue of the claim, and the action was sent for trial, under s. 65 of the County Courts Act, 1888, in the county court. The defendant paid the 8*l.* 14*s.* within seven days, and at the trial in the county court judgment was given for him as to the residue, but no order was made as to costs. The Divisional Court held that the defendant was not entitled to costs. In the course of his judgment Ridley J. said: "Has the county court judge the same power over the costs that a judge of the High Court would have? Can he say that the costs down to the recovery of the 8*l.* 14*s.* must be paid by the defendant, but the rest of the costs must be borne by the plaintiff? I do not think he has such power, although I should be much inclined to say that he ought to exercise such a discretion if he possessed it. But the discretion of the judge is, by s. 113 of the County Courts Act, 1888, limited to costs 'not herein otherwise provided for,' and that I think narrows the power of the county court judge to deal with the costs to such matters as are not dealt with by the general scheme of the Act. The section seems to me to have been put in with a view to include such costs as were not dealt with by the general enactment as to costs, but in the absence of any special direction it was provided that costs should abide the event." I cannot agree with those dicta. I cannot think that the general provision in s. 113 that costs shall follow the event in default of any special direction can be intended to affect the power of the county court judge to give costs. To my mind the suggestion cannot be accepted that the words "not herein otherwise provided for" narrow the power of the county court judge in such a way that he cannot deal with costs which are to follow the event in the absence of any special direction. "Otherwise provided for" means otherwise provided for in the rules. The dicta in the passage I have read were not necessary to the decision, because there had been no order as to costs in that case. Sect. 65 of

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the County Courts Act, 1888, which gives the power to send certain actions of contract for trial in the county court, provides that "the action and all proceedings therein shall be tried and taken in such Court as if the action had been originally commenced therein; and the costs of the parties in respect of proceedings subsequent to the order of the judge of the High Court shall be allowed according to the scale of costs for the time being in use in the county courts." Sect. 113 provides that "all the costs of any matter or action in the Court, not herein otherwise provided for, shall be paid by and apportioned between the parties in such manner as the Court shall think just, and in default of any special direction shall abide the event of the action or matter." Reading those two sections together, I think it clear that the county court judge's discretion as to costs is not limited in the way suggested. It must, I think, be admitted that, if the action is an action in the county court, the judge has a discretion under s. 113. In my opinion, the action, when transferred to the county court, must be conducted in the same way and with the same consequences as if it had been commenced in that Court, and s. 113 applies. It is not a sufficient answer for the plaintiffs to say that because they have recovered something the costs must be according to that result. I am, therefore, of opinion that the plaintiffs' appeal fails. The defendants are entitled to their costs, and to have them taxed according to Scale C. I wish to add that we decide this case upon the understanding that the county court judge did not exercise his discretion as to whether the defendants' costs should be allowed on Scale B or on Scale C, but that he thought he was bound to allow them on Scale B as being the scale legally applicable.

WILLS J. I am of the same opinion, and I have little to add. The order as to costs made by the county court judge in this case was not made in the exercise of a judicial discretion between the two scales of costs; it was made upon a wrong view that Scale B, and not Scale C, was the scale legally applicable to the circumstances of the case before him. We should not, of course, interfere with his decision if he had only

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been considering whether as a matter of the proper exercise of his discretion he should give the defendants their costs on Scale B or on Scale C. But that is not so; he meant to give costs according to the scale provided in the Act, and his order was founded, not upon an exercise of his discretion, but upon an erroneous application of principle. It was argued for the plaintiffs that in a scheme, devised by the Legislature for the trial speedily and at a moderate expense of actions sent for trial in the county court, there were no means by which the defendant could get his costs in the county court if he had paid money into court under an order made under Order XIV. If that be so, the consequence follows that the defendant is exposed to the certainty of having to pay costs on Scale C if the plaintiff succeeds in the county court; but that if the plaintiff recovers nothing at the trial in the county court because the defendant has paid into court all that he owes, then the defendant cannot be entitled to any costs at all. That is a startling view; and, speaking for myself, if I thought it was the true view to take, I would never in such a case make an order sending an action for trial in the county court. I am not fond of the argument ab inconvenienti; but I think it may sometimes legitimately be used when the argument on the other side leads to a result so unjust as that which has been contended for here. I do not think the Legislature can have intended to bring about such a result, and one has to see whether some other view is not the true one. I will not go again over the ground trodden by my Lord in the judgment he has delivered. As to the dicta attributed to my brothers Ridley and Darling in *Wright & Son* v. *Bull* (1), I do not agree with those dicta. We are not bound by them; they were not necessary to the decision of the case, and the question was, therefore, not argued as it has been here. If the same kind of argument as we have had here had been addressed to the Court, probably they would not have said what they did say. I agree with my Lord's judgment both as to the dicta in *Wright & Son* v. *Bull* (1) and on the other points which have been argued in this case.

(1) [1900] 2 Q. B. 124.

KENNEDY J. I agree with the judgment of the Lord Chief Justice.

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Defendants' appeal allowed. Plaintiffs' cross-appeal dismissed. Leave to appeal.

Solicitors for plaintiffs: *A. H. Arnould & Son, for Buller & Cross, Birmingham.*

Solicitors for defendants: *Christopher & Roney, for Hunt & Skidmore, Wolverhampton.*

W. A.

THE KING *v.* WEST RIDING JUSTICES.

1904
Feb. 1, 2.

Justices — Quarter Sessions — Jurisdiction — Licensing Appeals — Costs of Licensing Justices—Alehouse Act, 1828 (9 *Geo.* 4, *c.* 61), *s.* 29 — *Licensing Act,* 1902 (2 *Edw.* 7, *c.* 28), *s.* 20.

Upon the hearing of an appeal to quarter sessions from licensing justices, the licensing justices are entitled in the case of an unsuccessful appeal to an order under s. 29 of the Alehouse Act, 1828, upon the appellant for payment of such sum by way of costs as in the opinion of the Court will indemnify them from all costs and charges to which they may have been put; in the case of a successful appeal to a like order under s. 20 of the Licensing Act, 1902, upon the treasurer of the county or place for which the licensing justices acted.

Upon any such appeal the licensing justices are entitled to retain any solicitor whom they select to act for them, and they cannot be compelled to appear by the county solicitor, although it may be part of the duties of that officer to act for licensing justices upon the hearing of appeals from their decisions. Where licensing justices appear by their own solicitor, the Court of quarter sessions has no jurisdiction, in making an order under either s. 29 of the Alehouse Act, 1828, or s. 20 of the Licensing Act, 1902, to attach to it a direction to the clerk of the peace that in ascertaining the amount of the costs he is to exclude the personal professional charges of the solicitor employed by the licensing justices.

RULES NISI for writs of mandamus and certiorari to the justices of the West Riding sitting in quarter sessions, granted under the following circumstances.

At the general annual licensing meeting in and for the East Morley division of the West Riding, held on February 5, 1903, the licensing justices refused to grant a certificate by way of

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renewal of the full licence of the White Hart Hotel, Drighlington, to one Waterhouse, who duly gave notice of appeal to quarter sessions against the refusal. The licensing justices retained their own clerk, Mr. B. C. Rawson, to act as their solicitor in the conduct on their behalf of the appeal at quarter sessions. On April 9, 1903, the appeal was heard at quarter sessions, and was in the result allowed.

For more than a hundred years there had been in the West Riding an official known as the county solicitor, who was paid by salary out of the county funds; he was for many years appointed by the justices in quarter sessions, but since the passing of the Local Government Act, 1888, and the transfer by that Act to the county council of the administrative business of quarter sessions, he had been appointed by the county council of the West Riding under s. 3, sub-s. x., of that Act. Among his duties was that of representing and acting for the justices acting in or out of sessions in all judicial business affecting their acts as justices, including the defence of appeals from their decisions under the Licensing Acts. The appointment of the county solicitor was published in the records of the Court of quarter sessions, and was said to have been made known to the justices and their clerks, and to be well known in the Riding.

When the appeal was allowed, the licensing justices became entitled to their costs under s. 20 of the Licensing Act, 1902, and application was made on their behalf for an order under that section that the treasurer of the West Riding should pay them such sum as, in the opinion of the Court, should be sufficient to indemnify them from all costs and charges to which they might have been put, and which could not be recovered from any other person. The Court of quarter sessions before which the appeal was heard were of opinion that there was no reason why the licensing justices should not, in accordance with the general practice in the West Riding, have been represented by the county solicitor, and the deputy chairman (who presided at the hearing of the appeal) at first declined to make any order upon the application for costs; but later in the day he announced that, after consulting with the

chairman of quarter sessions, they had decided to make an order for the costs of the licensing justices, but had further ordered that the personal professional charges of the solicitor should be excluded by the clerk of the peace in ascertaining the amount of the costs. A rule nisi was, therefore, obtained on behalf of the licensing justices for a writ of certiorari to remove and quash the order of quarter sessions upon the ground that it was bad in law, as the limit therein contained was imposed without jurisdiction. At the same time a rule nisi was also obtained for a writ of mandamus commanding the Court of quarter sessions to hear and determine according to law the matter of the application of the licensing justices for an order of indemnity for costs under s. 20 of the Licensing Act, 1902.

At the same general annual licensing meeting the same licensing justices refused to renew the licence of the Crown Point Hotel at Drighlington to one Squire Briggs, who appealed to quarter sessions; this appeal, which was heard at the same quarter sessions but before a different bench, presided over by the chairman of quarter sessions, was dismissed. This case further differed from the other one in that, upon the dismissal of the appeal, the licensing justices became entitled to their costs under s. 29 of the Alehouse Act, 1828, from the unsuccessful appellant. During the day the chairman announced that the justices were anxious to have the matter tested as to the right of justices for the West Riding to employ their own clerk as their solicitor in appeals to quarter sessions; that they were of opinion, and judicially held, that on the true construction of s. 29 the licensing justices were only entitled to be indemnified against the costs properly incurred by them; that there were no circumstances in the case justifying a deviation from the ordinary practice of employing the county solicitor; and that the costs of employing their own solicitor were not properly incurred. It was agreed that the costs should be taxed out of sessions; and the Court made an order in the terms of s. 29 that the appellant should pay the costs of the licensing justices, with an instruction to the clerk of the peace in ascertaining the amount to be paid to exclude the

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personal professional charges of the solicitor, other than counsel's fees, &c. Rules for a certiorari and mandamus were obtained as in the previous case. (1)

Danckwerts, K.C., and *Compston*, for the justices, shewed cause. The order of quarter sessions was properly made, and the rules should be discharged. It is plain from the affidavits that the office of county solicitor had been in existence for upwards of a century, and that the holder had been in the habit of representing licensing justices on the hearing of appeals from their decisions. The quarter sessions acted on the view expressed by Bigham J. in *Reg.* v. *Winder* (2), that an indemnity against the costs to which justices have been put means costs to which they have been properly put, and the licensing justices in the present case cannot be said to have been properly put to the costs of employing a special solicitor when they might have availed themselves of the services of the county solicitor. The object of the quarter sessions was to save the county ratepayers from the payment of unnecessary costs of appeals, and

(1) By 9 Geo. 4, c. 61 (The Alehouse Act, 1828), s. 29, "In every case where notice of appeal against the judgment of any justice in or concerning the execution of this Act shall have been given, and such appeal shall have been dismissed, or the judgment so appealed against shall have been affirmed, or such appeal shall have been abandoned, it shall be lawful for the Court to whom such appeal shall have been made or intended to be made, and such Court is hereby required, to adjudge and order that the party so having appealed, or given notice of his intention to appeal, shall pay to the justice to whom such notice shall have been given, or to whomsoever he shall appoint, such sum, by way of costs, as shall in the opinion of such Court be sufficient to indemnify such justice from all cost and charge whatsoever to which such justice may have been put in consequence of his having had served upon him notice of the intention of such party to appeal."

By 2 Edw. 7, c. 28 (The Licensing Act, 1902), s. 20, "In every case of appeal against the decision of any licensing justice, the Court to which such appeal is made shall adjudge and order that the treasurer of the county or place, in and for which such justice, whose decision is appealed against, shall have acted on the occasion when he gave such decision, shall pay to such justice such sum as, in the opinion of the Court, shall be sufficient to indemnify such justice from all costs and charges whatsoever to which such justice may have been so put, and which cannot be recovered from any other person."

(2) [1900] 2 Q. B. 666.

all that they did was to give a perfectly proper direction as to the mode of taxation of the costs of the licensing justices in order to ensure that this statutory indemnity against costs should be limited to such costs as they had reasonably and properly incurred. The action taken by quarter sessions is analogous to that taken by a judge of the Superior Court when he deprives a party of costs for good cause, as, for instance, in *Huxley* v. *West London Extension Ry. Co.* (1) and *Roberts* v. *Jones.* (2) The question being, in substance, merely one of taxation, this Court will not interfere with the exercise of its discretion by quarter sessions. Nor will the Court interfere by mandamus where a Court of quarter sessions, after due consideration, exercise their discretion by refusing to give the costs of an appeal to licensing justices: *Reg.* v. *Justices of London.* (3) [He also cited *Reg.* v. *Middlesex Justices.* (4)]

Macmorran, K.C. (*E. Greenwood* with him), for the licensing justices, in support of the rule. The orders of quarter sessions were, so far as regards the direction appended to them, made without jurisdiction. It is clear that it is imperative on quarter sessions to make an order under s. 29 of the Act of 1828 for an indemnity to the licensing justices against the costs to which they have been put: *Reg.* v. *Worcestershire Justices* (5), where *Reg.* v. *Justices of London* (6) was not followed. The orders are right, apart from the special directions, and those directions are not a mere question of taxation of amount, but seek to impose a new principle of taxation which was beyond the jurisdiction of the Court; a sum for costs must not be fixed, whether by taxation in or out of Court, which to the knowledge of the Court will not cover the costs incurred. The action of quarter sessions is an attempt to compel the licensing justices to employ the county solicitor, but there is no statutory enactment which deprives the licensing justices of the ordinary right of every litigant to employ his own solicitor. Further, the county solicitor is not an officer

(1) (1889) 14 App. Cas. 26.
(2) [1891] 2 Q. B. 194.
(3) [1895] 1 Q. B. 616, 637.
(4) (1877) 2 Q. B. D. 516.
(5) [1900] 2 Q. B. 576.
(6) [1895] 1 Q. B. 616.

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of the justices in quarter sessions, but is an officer of the county council by virtue of s. 118, sub-s. 13, of the Local Government Act, 1888, under which section he is one of the existing officers transferred to the county council, while new appointments to the office are made by that body under s. 3, sub-s. x., of that Act. The orders being bad, they should be brought up by writs of certiorari to be quashed, while mandamus is asked for on the ground that the justices have not formed a judicial opinion and have not acted under s. 29 of the Act of 1828.

Danckwerts, K.C., referred to *Henderson* v. *Merthyr Tydfil Urban Council.* (1)

Bruce Williamson, for the licence-holder, did not argue.

LORD ALVERSTONE C.J. This case is not wholly free from difficulty; but I have come to the conclusion that these orders go too far and cannot be supported. It is not necessary for me to refer to the Licensing Act, 1902, for it is admitted that the effect of s. 20 of that Act is to give practically the same jurisdiction to quarter sessions to make an order indemnifying licensing justices against the costs incurred by them when their decisions are reversed on appeal as they have under s. 29 of the Alehouse Act, 1828, when the decisions of licensing justices are upheld; the two cases before us are, therefore, in the same position and must stand or fall together. I think that Mr. Danckwerts made good his contention that, if the justices had acted under s. 29 of the Act of 1828, and had fixed a sum, either ascertained or to be ascertained and inserted in their order, which in their opinion would be sufficient to indemnify the licensing justices against the costs which they had been put to in consequence of being served with the notice of appeal, this Court could not have interfered. In such a case quarter sessions might have gone wrong in the mode in which they exercised their jurisdiction; but they would have exercised it, and we could not quash their order on certiorari as being ultra vires, or grant a mandamus to compel them to rehear what they had already heard. But upon consideration

(1) [1900] 1 Q. B. 434.

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of the facts stated in the affidavits, that is not the way in which this case comes before us.

The same question no doubt arises on both the orders made by quarter sessions, though there does not seem to be the same reason for making the order in the case of an unsuccessful appeal against the decision of the justices as in that of a successful appeal, for in the latter case the costs of the licensing justices have to come out of the public funds. The form of the order made in the unsuccessful appeal shews that it was not merely an ordinary order under s. 29 as to costs, but that it embodied, as stated on its face, a further order made in view of the fact that particular matters had been brought before the Court. In the case of the successful appeal, quarter sessions at first declined to make any order at all as to costs, in which they were clearly wrong. *Reg.* v. *Winder* (1), upon which they seem to have relied, is no authority in favour of that course; but they subsequently modified their view and made the order now before us. In none of the affidavits is there any distinct explanation of the meaning of the expression "in view of the matters brought before the Court"; but the chairman of quarter sessions says very fairly in his affidavit that there were no circumstances in the appeal to shew that it could not have been conducted by the county solicitor, and that, after consideration, they were agreed that there were no circumstances justifying a departure from the ordinary practice of quarter sessions. It has been suggested that this was a mere matter of the mode of taxation adopted by quarter sessions, with which this Court could not interfere; but it is clear from the affidavits that this was not so, but that what happened was that the justices drew up a special order, because they felt that licensing appeals ought to be conducted on behalf of the licensing justices by the county solicitor. It was not an order merely fixing the amount of the costs, but it contained an addition, which was inserted for a special purpose and with a special motive. The case, therefore, is taken out of the region of taxation, and raises the point whether quarter sessions could refuse an order under

(1) [1900] 2 Q. B. 666.

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s. 29 because they were of opinion that the licensing justices ought to have employed the county solicitor; in other words, it raises the question whether there is a legal obligation on the licensing justices to employ the county solicitor. Upon that point I feel no doubt; there is no statute or rule which compels them to employ him. The provisions of s. 66 of the Local Government Act, 1888, which deal with costs not otherwise provided for, and makes them payable out of the county fund, cannot overrule the statutory right of the licensing justices under s. 29 of the Act of 1828, and s. 118, sub-s. 13, of the Local Government Act, 1888, which has been referred to, only transfers county administrative officers to the county council and affects no existing rights. I think, therefore, that the order of quarter sessions, which was drawn up so as to raise this question, was not made within their jurisdiction under s. 29, and that no good reason has been shewn why the rules granted should not be made absolute. The orders of quarter sessions, so far as they deal with a special direction as to costs, will therefore be quashed, and the matter will go back to that Court with an intimation that, in considering the question of a proper indemnity, they are not to make any order which would have the effect of depriving the licensing judges of their right to choose and employ their own solicitor.

WILLS J. I am entirely of the same opinion. There is nothing in any legislative enactment which gives the justices in quarter sessions jurisdiction to order licensing justices to employ a particular solicitor to act for them in appeals from their decisions. It is not clear whether the quarter sessions of the West Riding ever passed a formal resolution to that effect, but, if passed, such a resolution would be wholly nugatory, as having been made without jurisdiction either at common law or by statute. A direction to employ the county solicitor would be no more within their power to enforce than a direction to employ a particular named solicitor. That being so, the licensing justices cannot be deprived of their right to an indemnity against their costs by reason merely of their not having employed the county solicitor. It is abundantly

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clear that the non-employment of the county solicitor is what is meant by the "matters brought before the Court" mentioned in the orders of quarter sessions. It seems further to be the very point which quarter sessions desired to raise for our decision, and that the orders were framed with the view of raising it. If that is so, it appears on the face of the orders that the justices in quarter sessions assumed to exercise a jurisdiction which they did not possess, and that the question raised here is not merely a question of taxation, but one of the application of a false principle. There being no material distinction between the two orders of quarter sessions, they should both be quashed.

KENNEDY J. I entirely concur, and have nothing to add.

Rules absolute.

Solicitors for quarter sessions: *Clements, Williams & Co., for T. C. Edwards, Wakefield.*

Solicitors for licensing judges: *Farmer, Rawson & Co.*

Solicitors for licence-holder: *Walker & Rowe, for E. O. Wooler & Co., Leeds.*

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BAGG *v.* COLQUHOUN.

Justices—Jurisdiction—Equal Division of Opinion—Power of Adjournment—Summary Jurisdiction Act, 1848 (11 & 12 *Vict. c.* 43), *s.* 16.

An information under the Licensing Acts was heard before two justices, who, after hearing the evidence, retired to consider their decision; on their return into Court they announced that they were divided in opinion, and adjourned the information to a future day, when it was reheard before five justices, including the two who had previously heard it. An objection taken to their power to rehear the information was overruled, and in the result they convicted the person charged:—

Held, that the announcement of the justices at the original hearing that they were divided in opinion did not amount to a dismissal of the information so as to deprive them of their power of adjournment under s. 16 of the Summary Jurisdiction Act, 1848; that the power of adjournment was exercised "during such hearing" within the meaning of that section, and that there was consequently jurisdiction to rehear the information.

CASE stated by justices for the borough of Swansea.

An information under the Licensing Acts, 1872 and 1874, had been preferred by the respondent against the appellant for selling and exposing for sale intoxicating liquors during prohibited hours. The information was heard on August 18, 1903, before two justices, who, after hearing the evidence, retired to consider their decision. Upon their return they announced in open Court that they were divided in opinion, whereupon the appellant's solicitor asked that the information should be dismissed. The justices decided that a more satisfactory decision could only be arrived at upon a rehearing with other of their fellow justices, and said that they had agreed to adjourn the information to a future day, when they and other justices on the rota for that day would be convened to rehear it; they further stated that they were unanimous in agreeing to the adjournment.

The information again came on for hearing on September 15, 1903, before five justices, including the two justices who had heard it on the previous occasion. Upon its being called on, counsel for the appellant objected to the jurisdiction of the

justices present to rehear the information on the ground that it had been heard and determined by the two justices on August 18, and that as they could not agree, and as the information was a criminal information upon which the appellant could have been fined on conviction and imprisoned in default of distress, they could not or should not have adjourned the information, but should have dismissed it, and he cited in support of his contention *Reg.* v. *Ashplant* (1); *Kinnis* v. *Graves.* (2) The respondent's solicitor contended that it was competent for the two justices who were divided in opinion to adjourn the information to a future date for rehearing by themselves and other justices, and that no decision or determination was come to by the justices when they agreed to adjourn the information; he cited *Ex parte Evans.* (3) The justices determined that they had power to rehear the information, and in the result convicted and fined the appellant. They were of opinion that, although the information was a criminal one and punishable after conviction by fine or imprisonment, they had a right to rehear it; that the two justices who had previously heard it had not determined the matter of the information but had agreed to adjourn it for rehearing before themselves and other brother justices, so that a more satisfactory determination could be arrived at.

The question for the Court was whether upon the facts stated the justices had come to a correct determination in point of law.

S. T. Evans, K.C. (*Ivor Bowen* with him), for the appellant. The justices had no power to adjourn the case upon the first hearing, and the second hearing was without jurisdiction. The power to adjourn, in the case of an inferior tribunal, depends upon statute, and the only power of adjournment in the present case was that given by s. 16 of the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43). That power is in terms confined to adjournment "before or during" the hearing. The adjournment in the present case was not an

(1) (1888) 52 J. P. 474. (2) (1898) 67 L. J. (Q.B.) 583.
(3) [1894] A. C. 16.

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adjournment during the hearing; the action of the justices amounted to a dimissal of the case.

[LORD ALVERSTONE C.J. How do you take the case out of the decision in *Kinnis* v. *Graves* (1), where Wills J., admitting that adjournment was discretionary, pointed out that in the case of an equal division of opinion it was the proper course for the justices to pursue?]

No doubt as an expression of opinion that case is against the appellant, but it is not in point, for here the justices retired to consider their decision, and came back into Court and announced what it was. [He also cited *Ex parte Evans* (2); *Jones* v. *Williams* (3); *Reg.* v. *Ashplant.* (4)]

Avory, K.C., and *Lewis M. Richards* for the respondent, were not called upon to argue.

LORD ALVERSTONE C.J. In this case no question arises as to a mandamus to the justices to rehear the information, nor do any of those points arise which have created difficulties in cases in which the justices, though originally divided in opinion, have nevertheless proceeded to give a decision which has subsequently been embodied in an order; such difficulties notably arose in *Kinnis* v. *Graves* (1), where Wills J. expressed a strong opinion that the magistrates, being equally divided in opinion, might and ought to have adjourned instead of proceeding to an immediate decision. It is contended that the facts of the present case do not bring it within the power to adjourn "during such hearing" conferred on justices by s. 16 of the Summary Jurisdiction Act, 1848, but in my opinion the expression "during such hearing" means at any period before a final decision. I do not think it can be successfully contended that there was a final decision in the present case; the justices did not affect to dismiss the information, nor did that which they said amount to a dismissal; they merely said that, being equally divided, they were agreed to adjourn the hearing. In *Jones* v. *Williams* (3) a conviction by two justices was, before it was drawn up, reversed by one of them (who had changed

(1) 67 L. J. (Q.B.) 583.
(2) [1894] A. C. 16.
(3) (1877) 46 L. J. (M.C.) 270.
(4) 52 J. P. 474.

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his mind) and a third justice, who had not heard the case, without the assent of the remaining justice; yet it was held that there was no good conviction. Looking at that decision, I think that the present is an a fortiori case. It would be lamentable if, under such circumstances as those with which we are dealing, we were compelled to hold that there had been such a concluding of the hearing that the justices had no power to adjourn. I express no general opinion as to the stage at which the line is to be drawn; it may be that it is the time when the order is drawn up. In any event the mere expression on the part of justices of an equal division of opinion does not deprive them of their power of adjournment.

WILLS J. I am of the same opinion. I adhere to the opinion as to the propriety of adjourning in such a case which I expressed in *Kinnis* v. *Graves* (1), and am quite clear that the power of adjournment was not taken away by anything that happened in the present case.

KENNEDY J. I agree.

Solicitors for appellant: *Riddell & Co., for Viner Leeder & Morris, Swansea.*

Solicitors for respondent: *Helder, Roberts & Co., for Laurence Richards Swansea.*

(1) 67 L. J. (Q.B.) 583.

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Feb. 19.

[IN THE COURT OF APPEAL.]

HARSE *v.* PEARL LIFE ASSURANCE COMPANY.

Insurance, Life—Contract—Illegality—Policy on the Life of Another—Absence of Insurable Interest—Recovery of Premiums—Life Assurance Act, 1774 (14 *Geo.* 3, *c.* 48), *ss.* 1, 2.

The agent of the defendants, an insurance company, in good faith and believing his statement to be true, represented to the plaintiff that an insurance effected by him on the life of his mother would be a valid insurance, and the plaintiff, relying upon that representation, effected such an insurance and paid premiums thereunder. In an action to recover back the premiums:—

Held, that, assuming the policy to be illegal and void for want of an insurable interest, the representation having been innocently made by the agent, the parties were in pari delicto, and the premiums could not be recovered back.

Decision of the Divisional Court, [1903] 2 K. B. 92, upon this point reversed.

APPEAL from the judgment of a Divisional Court, reported [1903] 2 K. B. 92, in favour of the plaintiff upon an appeal from a decision of the judge of the Oxford County Court.

It appeared from the county court judge's notes that in April, 1889, a proposal was made to the plaintiff, by an agent of the defendant insurance company, that he should effect an insurance with the defendants upon the life of a relative. The plaintiff agreed to insure the life of his mother, who was residing with him as his housekeeper, and to whom he made a money allowance. In the proposal form the pecuniary interest in the life insured was stated to be, "Son for funeral expenses." The plaintiff's father was alive, but he was paralyzed and unable to earn any money, and would not be in a position, in the event of his wife predeceasing him, to pay for her funeral expenses. Subsequently the plaintiff was induced by the defendants' agent to effect a second policy with the defendants upon his mother's life. The proposal form of that policy was signed with the name of the mother, but the plaintiff stated that the policy was effected for his benefit, and the premiums

were paid by him. The mother in giving her evidence denied that she had signed the proposal form.

In 1902 the plaintiff, being informed that the policies were void for want of insurable interest, brought the action in the Oxford County Court to recover the premiums paid by him under the two policies during the preceding twelve years, amounting to 43*l.* 8*s.* At the trial the judge left the following questions to the jury: "(1.) Had the person for whose benefit the assurance was really made a real pecuniary interest under either policy?—Yes. (2.) Did the agent in either case make a statement which was false in fact? If so, what was it?—No. (3.) Did the agent in either case know that what he was saying was untrue?—No. (4.) Was either policy, or were both, taken out in consequence of what the agent had said?—Yes. (5.) Did the agent in either case represent that the policy had been a good one?—Yes. (6.) Were the agents in what they did, or was either of them, guilty of any fraud, and, if so, in what respect?—No." The jury were unable to agree whether the mother signed the proposal form. The county court judge held as matter of law that under the circumstances the fact that the plaintiff would morally be bound to pay for his mother's funeral expenses, failing the ability of his father to pay for them, gave rise to a sufficient pecuniary interest to satisfy the statute of 14 Geo. 3, c. 48; that the first policy was consequently good, and the premiums paid under it could not be recovered back. He also held with regard to both policies that, even if they were void for want of insurable interest, the premiums could not be recovered back, for the parties were in pari delicto, the representation of the agent as to the validity of the policies being a representation as to a matter of law, and having been innocently made. He accordingly gave judgment for the defendants. The plaintiff appealed.

The Divisional Court held that the fact that a person will at some future date be under a moral, though not a legal, obligation to pay for the funeral expenses of a relative is not sufficient to create an insurable interest in that relative's life; and, as to both policies, that, as the plaintiff was entitled to assume that

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the defendants' agent would have a knowledge of insurance law, the parties were not in pari delicto, and the premiums could consequently be recovered back.

Judgment was accordingly given for the plaintiff. (1) The defendants appealed.

Sir E. Clarke, K.C., and *S. T. Evans, K.C.* (*J. J. Parfitt* with them), for the defendants. With regard to the first policy, it is submitted that the plaintiff had a sufficient insurable interest in his mother's life in respect of the reasonable probability under the circumstances that the expenses of her funeral would have to be defrayed by him: *Barnes* v. *London, Edinburgh and Glasgow Life Insurance Co.* (2) That decision also shews that the interest of the insurer need not be a pecuniary interest like that arising from the relation of debtor and creditor. The second policy appears on the face of it to be a valid policy taken out by the mother on her own life. The jury did not answer the question whether the signature on the proposal form was that of the mother or not. The onus of shewing that the policy was void lay on the plaintiff. But, assuming that both policies were void for illegality, the plaintiff is not entitled to recover the premiums paid by him. Where money is paid in pursuance of an illegal contract, primâ facie the payer cannot recover it, both parties being in pari delicto: *Howard* v. *Refuge Friendly Society*. (3) It was held in *British Workman's and General Assurance Co.* v. *Cunliffe* (4) that, where the agent of an insurance company had falsely represented that a policy would be valid, the premiums could be recovered; but in that case the agent knew that the representation was untrue, and was guilty of fraud in making it. In this case the jury have negatived any fraud on the part of the agent. Assuming that what the agent said in this case really amounted to a representation that the policy would be valid, it was an innocent representation on his part, and therefore cannot prevent the parties from being in pari delicto.

(1) [1903] 2 K. B. 92.
(2) [1892] 1 Q. B. 864; 8 Times L. R. 143.
(3) (1886) 54 L. T. 644.
(4) (1902) 18 Times L. R. 425, 502.

Unless there is some misrepresentation of fact or some fraudulent misrepresentation of law by the agent, the premiums paid on an illegal contract of insurance cannot be recovered back, both parties being presumed to know the law. All that the plaintiff has established is an innocent misrepresentation on a question of law which is not sufficient to entitle him to recover the premiums: *West London Commercial Bank* v. *Kitson* (1), *Kearley* v. *Thomson* (2), and *Rashdall* v. *Ford.* (3)

Montague Shearman, K.C., and *Cecil Walsh*, for the plaintiff. The plaintiff was making an allowance to his mother and not receiving one, and so the only question that arises as to interest on the first policy is whether the moral obligation to pay for her funeral expenses is sufficient. He would not be under any legal liability to pay them, and nothing short of that would create a sufficient interest to make the first policy good. The decision in *Barnes* v. *London, Edinburgh and Glasgow Life Insurance Co.* (4) was based on the fact that money had been actually expended in supporting the child, as is apparent from the judgments. As to the second policy, it was taken out, not by the mother, but by the plaintiff for his own benefit, and was void for want of an insurable interest, and, under s. 2 of the statute, for not disclosing the name of the person interested. As to both policies, the findings of the jury shew that the plaintiff paid the premiums in reliance on the statements of the agent of the company to the effect that the policies were legal. That was a representation of fact, and the plaintiff, relying on it, has paid the premiums without any consideration, and can recover them back. A representation as to the effect of a document was held in *West London Commercial Bank* v. *Kitson* (1) to be a representation of fact. If the representation is treated as made in respect of a matter of law, the parties were not on the same footing, for the plaintiff was entitled to assume that the defendants' agent had a knowledge of insurance law. It may be admitted that the ignorance of law on the part of the plaintiff would not, standing by itself, enable him to succeed in this action, but, when con-

(1) (1884) 13 Q. B. D. 360.
(2) (1890) 24 Q. B. D. 742.
(3) (1866) L. R. 2 Eq. 750.
(4) 1 Q. B. 864; 8 Times L. R. 143.

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sidered in relation to the fact that the parties were not dealing with the matter upon an equal footing, it is submitted that it will entitle him to recover back money paid under those circumstances. It is not a question between the plaintiff and the agent of the company, for the contract was made with the company, and it is their knowledge that is material. It was their representation, made through their agent, that there was an insurable interest, and if, with the knowledge that they have that there could be no insurable interest, they instruct their agent to make a representation to the contrary effect, the position of the parties is not equal.

COLLINS M.R. This is an appeal from a decision of a Divisional Court. It appears that the plaintiff effected with the defendants through their agent two insurances on the life of his mother. He continued to pay the premiums for some years till they came to more than the amount insured, and now seeks to recover them back. Dealing with the first policy in point of time, and assuming, though without deciding the matter, that the plaintiff had not a sufficient insurable interest in his mother's life to entitle him to take out a policy with regard to her funeral expenses, there remains the question of his claim to recover the premiums that he has paid. The ground on which the claim is based is that there has been a total failure of consideration, and that depends on the hypothesis that I have adopted of the illegality of the first transaction under the statute of 14 Geo. 3, c. 48; for if the plaintiff had been under any liability to pay the funeral expenses of his mother, the policy would be valid, and the premiums could not be recovered back. On the assumption that the policy was illegal, the plaintiff has paid money to the defendants upon an illegal bargain, and the question is whether he can recover it back. As to the other policy, the plaintiff effected it, on his own shewing, in his own interest. The jury have found as to both policies, in answer to questions 4 and 5 put to them by the county court judge, that they were taken out in consequence of the representation of an agent of the defendants that they were good policies, but that the agent

was not guilty of any fraud. The county court judge held that even if both policies were void for want of insurable interest, the representations having been innocently made, the premiums could not be recovered back. It is clear law that where one of two parties to an illegal contract pays money to the other, in pursuance of the contract, it cannot be recovered back. That rule was applied to a case similar to the second of these policies in *Howard* v. *Refuge Friendly Society*. (1) We therefore begin the discussion with the rule of law that primâ facie the plaintiff would be debarred from recovering the premiums paid on either policy. In this state of things it is said that what occurred between the plaintiff and the company's agent relieves the plaintiff from the operation of that rule. The statement, however, made by the agent was not a statement of fact, but one of the law, and was made innocently, as the jury have found. Unless there can be introduced the element of fraud, duress, or oppression, or difference in the position of the parties which created a fiduciary relationship to the plaintiff so as to make it inequitable for the defendants to insist on the bargain that they had made with the plaintiff, he is in the position of a person who has made an illegal contract and has sustained a loss in consequence of a misstatement of law, and must submit to that loss. Neither on the findings of the jury nor in the evidence can I find anything that brings the case within any of the classes that I have indicated. Under those circumstances the plaintiff cannot recover back the premiums that he has paid. We have the clear authority of this Court in *British Workman's and General Assurance Co.* v. *Cunliffe*. (2) In that case the decision of the Divisional Court was that the money could be recovered back where a person had paid premiums on the statement of an agent that the policy would be valid. This Court affirmed the decision that the money could be recovered, but did so expressly on the ground that the statement on which the assured acted was fraudulently made. This Court to that extent qualified, or at the least did not adopt, the ground of the judgment of the Court below. On the general law and on

(1) 54 L. T. 644. (2) 18 Times L. R. 425, 502.

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authority the plaintiff, in my opinion, has failed to establish his right to a return of the premiums, and the appeal must be allowed.

ROMER L.J. I am of the same opinion. Assuming that the two policies are void because they were illegal, it is clear that the plaintiff cannot recover the premiums that he has paid unless he can make out that he is not in pari delicto with the defendant company. Can he be said to have established that position? To do this reliance is placed on the statements made by the agent of the company. In my opinion there was no misstatement of fact, and it is further clear that there was no fraud—that it was not a case of oppression or duress, and that it was not a case of an advantage taken by a clever man over an ignorant one. The agent, like the plaintiff, had forgotten or mistaken the law. The finding of the jury amounts to this—that the agent had the belief that the policies were good. Unless it can be said that the statements made by the agent put the defendants in a worse position than the plaintiff, the parties were on an equal footing with regard to the transaction. I do not think the statement had that effect, nor do I think that agents of insurance companies must be treated as under a greater obligation to know the law than ordinary persons whom they approach in order to effect insurances. It appears to me that the parties must be taken to have been in pari delicto, and that the company cannot stand in a worse position than their agent. I agree, therefore, that the appeal should be allowed.

MATHEW L.J. concurred.

Appeal allowed.

Solicitors for plaintiff: *Esson & Mallam, for George Mallam & Son, Oxford.*

Solicitor for defendants: *J. M. Storer, for E. T. Hatt, Oxford.*

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1904
Feb. 26.

ELLIOTT *v.* CRUTCHLEY AND ANOTHER.

Contract—Impossibility of Performance—Payment made "on account of" Contract—Express Provision in event of Performance becoming impossible.

The plaintiff, a refreshment contractor, agreed with the defendants, who were acting on behalf of the Navy League, to supply refreshments on a steamer engaged for the purpose of taking members of the society to the naval review on the occasion of the King's coronation. By the terms of the contract a sum of 300*l.* was to be paid to the plaintiff "on account of the refreshments" on a day previous to the review day; and the contract contained a stipulation that, in the event of the cancellation of the review before any expense was incurred by the contractor, there should be no liability on the part of the defendants. The plaintiff expended a small sum on extra knives, forks, and crockery for the purposes of the contract, but nothing on refreshments. A cheque for 300*l.* was sent by the defendants to the plaintiff in accordance with the contract. On the next day, owing to the illness of the King, the review was countermanded. The cheque not having been presented by the plaintiff, payment of it was stopped by the defendants:—

Held, in an action on the cheque, affirming the decision of Ridley J., that the plaintiff was not entitled to recover, the true construction of the contract being that, in the event of the cancellation of the review, the defendants should only be liable to reimburse the plaintiff for any expense already incurred by him.

APPEAL from the judgment of Ridley J. in an action tried by him without a jury. (1)

The action was brought upon a cheque for 300*l.* drawn by the defendants.

The plaintiff was a refreshment contractor, who catered for passengers using the steamers owned by a company called the Coast Development Company. In March, 1902, an arrangement was made, by which that company agreed to place at the disposal of a society, called the Navy League, one of their steamers for the naval review to be held on June 28, in connection with the coronation of his present Majesty; and, as incidental to that arrangement, it was agreed by the defendants, who were acting on behalf of the Navy League, that the

(1) [1903] 2 K. B. 476.

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plaintiff should do the catering for the steamer on that occasion. By a letter dated March 4, the terms on which the plaintiff was willing to supply the refreshments were set out as follows: "He will supply the three meals, lunch, tea, and dinner, as per your menu, at 12*s.* 6*d.* per head . . . . you guaranteeing not less than 600 passengers, and paying for all over that number: wines and other drinks to be paid for by you at the company's ordinary tariff prices: 300*l.* to be paid to Mr. Elliott on account of the refreshments on the Monday previous to the review day." On March 5 one of the defendants, on behalf of the Navy League, wrote in answer, to the effect that they were willing to accept the terms offered, but added a postscript as follows: "It is of course understood that, in the event of the cancellation of the review before any expense is incurred by the caterer, there shall be no liability on our side." It appeared that on or before June 23 the plaintiff incurred some expense in the purchase of extra knives, forks, and crockery, and in printing tickets for the purposes of the contract, which amounted to about 20*l.*, but he had expended nothing in providing refreshments. On June 23 the cheque sued on was sent to the plaintiff signed by the defendants as officers of the Navy League. On June 24 it was known that, owing to the illness of the King, the review could not be held, and consequently the steamer never left the Thames, where she was lying. The cheque not having been presented by the plaintiff, payment of it was stopped by the defendants.

The learned judge gave judgment for the defendants.

J. G. Witt, K.C., and *A. P. Poley*, for the plaintiff. This case comes within the decision of this Court in *Chandler* v. *Webster* (1), for by the terms of the contract the sum of 300*l.* was payable to the plaintiff before the review was countermanded. The words "on account of the refreshments" do not import that the amount was to be repayable, if no refreshments were ultimately supplied through the further performance of the contract becoming impossible by no default of either party. They merely express the reason why the sum

(1) Ante, p. 493.

of 300*l.* was to be paid. The payment is analogous to that of advance freight, which cannot be recovered back if the voyage is not completed through perils of the sea: *De Silvale* v. *Kendall.* (1) The postscript to the letter of March 5 relates only to liability to further performance of the contract in the future, in the event of the review being cancelled, the words used being "there 'shall' be no liability"; it does not stipulate for a return of money already paid in pursuance of the contract. This stipulation really only expresses what in the cases has been held to be the legal implication on the subject. Moreover, it only provides for the release of the defendants, if no expense has been incurred by the contractor. Here expense had been incurred by the contractor, though no doubt not to a very large amount. The fact that the cheque was stopped can make no difference to the rights of the parties. The decision in *Cohen* v. *Hale* (2) has no bearing upon this case.

[They also cited *Taylor* v. *Caldwell* (3); *Blakeley* v. *Muller & Co.* (4); *Civil Service Co-operative Society* v. *General Steam Navigation Co.* (5)]

Montague Shearman, K.C., and *Eustace G. Hills*, for the defendants, were not called upon to argue.

COLLINS M.R. In this case an arrangement was made by the defendants, on behalf of a society called the Navy League, by which a steamer was to be engaged for the purpose of taking members of the society to see the naval review to be held upon the occasion of the coronation of the King, and, as incidental to that arrangement, it was necessary to provide for the catering on board the steamer. Accordingly an agreement was made by the defendants with the plaintiff which is contained in two letters dated respectively March 4 and 5. The first letter sets out the terms on which the plaintiff was willing to provide the refreshments as follows: "He will supply the three meals, lunch, tea, and dinner, as per your menu, at

(1) (1815) 4 M. & S. 37; 16 R. R. 373.
(2) (1878) 3 Q. B. D. 371.
(3) (1863) 3 B. & S. 826.
(4) [1903] 2 K. B. 760.
(5) [1903] 2 K. B. 756.

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12*s.* 6*d.* per head, ... you guaranteeing not less than 600 passengers, and paying for all over that number: wines and other drinks to be paid for by you at the company's ordinary tariff prices: 300*l.* to be paid to Mr. Elliott on account of the refreshments on the Monday previous to the review day." By the letter of March 5 the defendants, in answer, accepted the terms offered by the plaintiff, but added a postscript, which is very material, and is as follows: "It is of course understood that, in the event of the cancellation of the review before any expense is incurred by the caterer, there shall be no liability on our side." On the day mentioned in the letter of March 4 the defendants sent a cheque for 300*l.* drawn by them to the plaintiff; but, before that cheque was presented, the review was countermanded in consequence of the illness of the King, and payment of the cheque was stopped by the defendants. The plaintiff thereupon brought his action on the cheque. In my judgment the stopping of the cheque makes no difference to the rights of the parties, and they would have stood in exactly the same position if the cheque had been paid. I mention that, because the learned judge made some observations with regard to the fact that the cheque had been stopped, with which I do not wish to be taken to concur. He appears to have made those observations in considering what the position of the parties would have been in the absence of the postscript contained in the letter of March 5, and they do not seem to me to be really necessary to the conclusion at which he arrived. This Court has had in several cases, which have arisen out of the postponement of the coronation, to lay down the rule of law with regard to the rights of the parties to a contract where some future event, which was the basis of the contract, has become impossible through no default of either party.

The rule applicable to such cases was laid down quite recently in *Chandler* v. *Webster*. (1) In the absence of any special provision made by the parties with reference to the contingency of further performance of the contract becoming impossible, moneys paid in accordance with the terms of the

(1) Ante, p. 493.

contract must remain where they are when that contingency occurs; the party who has paid them, and by the contract was bound to pay them, cannot recover them back; but, as regards future liability, the contract is at an end. It is not to be treated as rescinded ab initio, but both parties are excused from further performance of it. The law lays down this rule, because, the parties not having contemplated or provided for the event which has happened, it is impossible for the Court to ascertain exactly what the rights of the parties should be in order to effect a restitutio ad integrum, and therefore they must be left respectively in the positions which they occupied when the further performance of the contract was ascertained to have become impossible. But in the present case I do not think the rule so laid down applies. Here the parties to the contract themselves appear to have contemplated and provided for the contingency which happened, namely, that of the further performance of the contract becoming impossible; and therefore the cases which deal with the rule applicable, where the parties have not contemplated or provided for such a contingency, do not apply. That being so, the case really depends entirely on the construction of the two letters, and particularly of the postscript to the letter of March 5. It was urged by the plaintiff's counsel that, construed according to the strict rules of grammar, that postscript, having regard to the use of the future tense "shall," only applied to any liability in futuro, after the cancellation of the review, and did not apply to the liability to the extent of 300*l.*, which had already accrued; or in other words that the postscript only expresses that which the law, in the absence of any such stipulation, would imply. I cannot so read it. I think that it must be construed reasonably with regard to what may be presumed to have been the intention of the parties, rather than with regard to any rigid grammatical rule. I think the fair meaning of the postscript is that, if the review did not take place, the parties were to be placed in the position in which the law, in the absence of any special provision by themselves, is unable to place them, namely, that there should be a rescission of the contract coupled with a restitutio ad integrum, which involves that any expenses

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incurred in preparing to carry out the contract shall be recouped. It assumes that the plaintiff is to be reimbursed for expense already incurred, but provides that, subject to this, all liability on either side shall be wiped out. It does not, in my opinion, provide merely for the excuse of the parties from any further liability under the contract, or for their release from further performance of it, but for its extinction ab initio, subject to the obligation to reimburse the plaintiff for the expense which he has already incurred. So reading the post-script, it appears to me a very fair and reasonable arrangement to make. For these reasons I think the appeal must be dismissed.

ROMER L.J. I am of the same opinion. I think that, on the true construction of these letters from a business point of view, this is not a case where the defendants contracted with the plaintiff for the supply of refreshments without reference to the question whether the review would take place or not. I think the true meaning of the contract is that, in the event of the review being cancelled, there should be no liability on the part of the defendants beyond that of reimbursing the plaintiff for the expense which he had already incurred. As we know, the review was cancelled; and, that being so, I think that the defendants were liable to pay to the plaintiff the amount of the expense already incurred by him, which appears to be about 20*l.* The defendants offered to reimburse the plaintiff, but he contended that he had a right to insist on payment of the 300*l.*, without reference to the amount of the damage really sustained by him. That contention was, in my opinion, wrong. I think the meaning of the contract was, as it says, that the sum of 300*l.* was to be paid "on account of" the moneys which were to become due to the plaintiff in respect of refreshments on the assumption that the review took place. I cannot gather from the terms of the contract that the plaintiff was to be absolutely entitled to that money although the review should be cancelled.

MATHEW L.J. I agree. If the terms of the contract had imported that the right of the plaintiff to the 300*l.* became

absolute on the Monday previous to the review day, a good deal of the argument for the plaintiff would have been relevant. In the cases on which the plaintiff's counsel relied the time had come when under the agreement a payment of money had become finally due. Here it seems to me clear that this was not the meaning of the parties. The contract imputed by the plaintiff to the defendants would have been most dangerous for them. Their expectation was that, out of the receipts for tickets, they would be able to raise the sum of 300*l.*, which was to be advanced by them "on account of refreshments"; and they therefore stipulated in the postscript to the letter of March 5 that, if the review were cancelled, they should be freed from all liability, except to the extent of any expense already incurred by the plaintiff. That, as a matter of business and common sense, appears to me to be the meaning of the contract made in this case. It has been suggested that the position of the plaintiff would have been different, if the cheque had been cleared. I cannot agree with that view. It seems to me that the rights of the parties would have been just the same, if it had been paid.

Appeal dismissed.

Solicitors for plaintiff: *Samuel Price & Sons.*
Solicitors for defendants: *Dowson, Ainslie & Martineau.*

E. L.

C. A.

1903
Nov. 20, 21, 23, 24.

1904
Feb. 22.

[IN THE COURT OF APPEAL.]

In re BEAUCHAMP.
Ex parte BEAUCHAMP.

Bankruptcy—Bankruptcy Notice—Address of Creditor—Power of Court of Bankruptcy to go behind Judgment—Irregularity in Form of Judgment—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*); *s.* 7, *sub-s.* 3—*Bankruptcy Rules*, 1886 *to* 1890, *Appendix*, *Form No.* 6.

The Court of Bankruptcy has power, on the hearing of a bankruptcy petition founded on a judgment debt, to go behind the judgment and inquire into the consideration for the debt.

But the fact that the judgment may be irregular or wrong in form is not a sufficient reason for going behind the judgment and dismissing the petition. A judgment is conclusive in the Court of Bankruptcy unless the consideration can be questioned.

It is not sufficient for a creditor who issues a bankruptcy notice to give in the notice an address at which he can be heard of; the address must be one at which the debtor can pay him, or secure or compound for the debt. The address must be that of a place at which the creditor is to be found during the seven days limited by the notice, whether the address is of the creditor's residence or of his place of business.

If the address stated in the notice is such an one at the date of the service, the occasional absence of the creditor from the place, even for a whole day, will not render the notice inefficient, unless the absence is such as to deprive the debtor of a reasonable opportunity of paying or securing or compounding for the debt according to the terms of the notice.

Nor would it make any difference that the address was the temporary home of the creditor, who had no permanent home, or that his absence occurred on the last day of the seven.

But if the creditor, after the service of the notice, abandons his place of address, so that it ceases to be a place where at reasonable times he, or some authorized agent on his behalf, can be found to receive payment of the debt, or to deal with the question of security or composition, the bankruptcy notice will cease to be efficient.

In re Stogdon, [1895] 2 Q. B. 534, commented on.

On July 25, 1901, an action for libel was commenced against a defendant, who in the writ and the pleadings was described as "a married woman." At that time a decree nisi had been made for the dissolution of the defendant's marriage. On November 25, 1901, the decree was made absolute. On October 30, 1902, the libel action was tried, when a verdict was found for the plaintiff with 5000*l.* damages, and the judge directed judgment to be entered accordingly.

The defendant applied for a new trial, and in June, 1903, the Court of

Appeal ordered a new trial, unless the plaintiff would consent to reduce the damages to 1500*l.* To this the plaintiff afterwards consented, and the judgment was on July 19 amended accordingly, but the date of October 30 was not altered. The judgment as drawn up was in the ordinary form of a judgment against an unmarried woman, instead of in the form of judgment against a married woman in respect of her separate estate, as settled by the Court of Appeal in *Scott* v. *Morley*, (1887) 20 Q. B. D. 120.

The 1500*l.* not having been paid, the plaintiff on July 28 served a bankruptcy notice on the defendant claiming payment of the 1500*l.*, with interest thereon from October 30, 1902. In the notice the creditor gave as her address an hotel in London where she was temporarily residing. She was in the habit of stopping at that hotel, but did not permanently retain a room there. On August 4, the last of the seven days limited for compliance with the notice, the creditor at 10.15 A.M. went away from the hotel, leaving no address behind her. She went to Newhaven and thence to France, where she remained till the end of September. The debtor did not comply with the bankruptcy notice, and on August 24 the creditor presented a bankruptcy petition against her founded on the judgment debt and the act of bankruptcy committed by non-compliance with the bankruptcy notice, and on this petition a receiving order was made.

It was objected by the debtor (1.) that the judgment was in a wrong form as a judgment against a defendant who was described in it as "a married woman"; (2.) that too large an amount for interest was claimed in the notice, inasmuch as the judgment for 1500*l.* did not really come into existence until the amendment of the original judgment; (3.) that the address of the creditor given in the notice was not such an address as is required by Form No. 6 in the Appendix to the Bankruptcy Rules 1886 to 1890:—

Held, by the Court of Appeal, (1.) that, inasmuch as at the date of the trial of the action the defendant was unmarried, and a judgment could have been obtained against her creating a personal debt, the objection to the judgment was one of form only, and the Court of Bankruptcy had no power to go behind the judgment.

(2.) That the objection as to interest was concluded by the judgment.

(3.) That the address given by the creditor in the bankruptcy notice was a sufficient compliance with Form No. 6, and that the creditor could not be taken to have abandoned her temporary address when she left the hotel.

APPEAL from a receiving order made against Lady Violet Beauchamp by one of the registrars.

On May 7, 1901, a decree nisi was made for the dissolution of her marriage on the ground of her adultery with Mr. Hugh Watt.

On July 25, 1901, Mrs. Watt commenced an action in the King's Bench Division against Lady Violet for libel. In the

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writ and in the pleadings the defendant was described as "a married woman."

On November 25, 1901, the decree nisi was made absolute.

On October 30, 1902, the libel action was tried, when the jury found a verdict for the plaintiff for 5000*l.*, and the judge ordered that judgment should be entered accordingly.

The judgment as entered was headed with the title of the action, in which the defendant was described as "a married woman," and it was adjudged "that the plaintiff recover against the defendant 5000*l.* and her costs to be taxed." The costs were afterwards taxed at 219*l.* 8*s.* 8*d.*

The defendant applied to the Court of Appeal for a new trial, on the ground (inter alia) that the damages were excessive. On June 17, 1903, the Court of Appeal ordered that there should be a new trial, unless the plaintiff would consent to reduce the damages to 1500*l.* The plaintiff afterwards consented to this, and on July 19 the judgment was amended by the master by substituting 1500*l.* for 5000*l.* The original date of the judgment—October 30, 1902—was not altered.

The 1500*l.* not having been paid, the plaintiff on July 28 served a bankruptcy notice on the defendant, claiming payment of the 1500*l.*, with interest from October 30, 1902. In the notice the plaintiff was described as "of Hans Crescent Hotel, Hans Crescent, in the county of London."

The plaintiff was at that time staying at the Hans Crescent Hotel, where she was often in the habit of staying, though she did not permanently retain any rooms there.

By the notice the plaintiff claimed payment of "the sum of 1769*l.* 10*s.* 9*d.*, as being the amount due for principal, interest, and costs on a final judgment obtained by her against you in the King's Bench Division, dated October 30, 1902, amended by order of the Court of Appeal, dated June 17, 1903."

At 10.15 on the morning of August 4, 1903, the last of the seven days limited by the bankruptcy notice, the plaintiff went away from the hotel in a motor-car, leaving no address behind her. She went to Newhaven, and thence to France, where she remained till the end of September. She had told her solicitors where she was going. The defendant did not comply

with the requirements of the bankruptcy notice, and on August 24, 1903, the plaintiff presented a bankruptcy petition against her, founded on the judgment debt and the act of bankruptcy committed by non-compliance with the bankruptcy notice.

On the hearing of this petition the registrar, on October 31, 1903, made the receiving order.

The debtor appealed.

1903. Nov. 20, 21, 23, 24. *Herbert Reed*, *K.C.*, and *Frank Mellor*, for the debtor. The creditor of a married woman has two rights against her. If she has separate estate he may, under s. 1, sub-s. 2, of the Married Women's Property Act, 1882, bring a statutory action against her alone, as to her separate estate; or he may bring a common action against both husband and wife. Here the action was against the married woman alone, seeking to make her liable in respect of her separate estate. The question is whether a married woman can be made bankrupt by the plaintiff upon the judgment in such an action. It is submitted that it is not competent for a creditor to do that. A married woman could not be committed to prison for default in paying a sum of money for which judgment had been recovered against her in respect of her separate estate by virtue of s. 1, sub-s. 2, of the Married Women's Property Act, 1882, in the form settled by the Court of Appeal in *Scott* v. *Morley*. (1) A creditor desiring to proceed against a married woman by an action in tort can either sue her and her husband in the ordinary way, or sue her alone under the Married Women's Property Act, 1882: *Seroka* v. *Kattenburg* (2); *Earle* v. *Kingscote*. (3) Here the creditor has elected to sue the debtor under the Act. That being so, she could sue the debtor only in respect of her separate estate, and the only judgment to which she was entitled was one in the form settled in *Scott* v. *Morley* (1); *Softlaw* v. *Welch*. (4) It is clear from *Scott* v. *Morley* (1) that the Act does not make the married woman, but only her separate estate, the debtor.

(1) 20 Q. B. D. 120.
(2) (1886) 17 Q. B. D. 177.
(3) [1900] 2 Ch. 585, 589.
(4) [1899] 2 Q. B. 419, 424.

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Long before that Act it was held that in an action, whether on contract or in tort, a married woman is under no personal liability whatever, her separate estate being alone liable: *Wainford* v. *Heyl.* (1) In truth, the only remedy which can be obtained against her is a judgment against her separate estate. It has been already decided by the Court of Appeal that a married woman cannot be made a bankrupt on a judgment in the form in *Scott* v. *Morley* (2); *In re Lynes* (3); *In re Frances Handford & Co.* (4)

The judgment in this case purports to be a judgment against a married woman, though it is in the ordinary form of a judgment against an unmarried woman, and is therefore in a wrong form.

The Court of Bankruptcy can go behind a judgment and inquire whether there was a real debt.

[VAUGHAN WILLIAMS L.J. In bankruptcy the Court will go behind a judgment for the purpose of seeing whether the person who is seeking to avail himself of the bankruptcy administration is entitled to share in the fund to be administered. But suppose that an action has been tried in the most irregular way, but still has been tried and judgment has been given in the presence of both parties, could the Court of Bankruptcy question the judgment on the ground that it was bad in law?]

The Court of Bankruptcy will inquire whether there is a liability on which a bankruptcy petition can be founded.

[VAUGHAN WILLIAMS L.J. Ought not this objection to have been taken in the Court which tried the action? The judgment having been given, is there not a good judgment debt upon which a bankruptcy notice can be issued? If the proper steps had been taken a good judgment could have been obtained against the debtor, who at that time had ceased to be a married woman. The objection is really only to the process by which the judgment was obtained.]

It is submitted that whatever may be the form of a judgment against a married woman it can only have the effect

(1) (1875) L. R. 20 Eq. 321, 324.
(2) 20 Q. B. D. 120.
(3) [1893] 2 Q. B. 113.
(4) [1899] 1 Q. B. 566, 570.

of a judgment against her separate estate under the Married Women's Property Act: *In re Frances Handford & Co.* (1) It can make no difference that the defendant became discovert after the commencement of the action. The object of the action when it was commenced must have been to bind her separate estate. On the application for a new trial in the Court of Appeal the only questions were whether the judge had misdirected the jury, and whether the damages were excessive. The Court of Appeal had nothing to do with the form of the judgment, and probably they never looked at it.

[VAUGHAN WILLIAMS L.J. If the judgment was entered in a wrong form, the plaintiff could have applied to the judge to amend it or to set it aside. But if a fi. fa. had been issued upon the judgment as it stands, could it have been set aside?]

If, as is submitted, the judgment can only operate under the Married Women's Property Act, it must follow that a fi. fa. could not issue upon it.

In fact, an appeal to the House of Lords against the judgment in the action is now pending, and if the receiving order is maintained an adjudication of bankruptcy against the debtor will follow and that appeal will be rendered nugatory. The present appeal might be ordered to stand over until the appeal to the House of Lords has been disposed of. The appellant would be willing to waive her other objections to the receiving order if the creditor will agree to the course now suggested.

Muir Mackenzie, for the creditor. The Court has a discretion in the matter, even if the petitioning creditor consents: *In re Flatau.* (2) But it is submitted that there is no ground for staying the proceedings under the receiving order. The notice of appeal to the House of Lords was served after that order had been made. The registrar was only told that it was intended to appeal to the House of Lords. There is no absolute right to a stay because of that appeal.

[VAUGHAN WILLIAMS L.J. The Court would no doubt look at all the circumstances, and must regard the interest of all

(1) [1899] 1 Q. B. 566. (2) [1893] 2 Q. B. 219.

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the creditors. But we are told that there is only this one creditor. We are disposed to allow this appeal to stand over on condition that the money is paid into court.]

Herbert Reed, K.C., and *Frank Mellor*, for the debtor. The debtor is unable to do that. She has a right to appeal to the House of Lords against the judgment, and if the receiving order stands she will be practically deprived of that right.

Another objection to the receiving order is that by the bankruptcy notice the creditor claimed interest on the 1500*l.* as from October 30, 1902, the day on which judgment was given in the action. But the 1500*l.* is claimed, not under the judgment, but by virtue of the order of the Court of Appeal. The plaintiff did not at once consent to reduce the damages, and during the interval pending her consent there was no judgment. There was no liability of the defendant until the judgment; there was no antecedent debt. There was no judgment for 1500*l.* until July 19, when the original judgment was amended by the master. *Fisher* v. *Dudding* (1) is distinguishable, for in that case there was an antecedent debt.

A third objection to the bankruptcy notice is this. The debtor was entitled to have an opportunity of paying the debt until the end of seven days from the service of the bankruptcy notice. Here, if the debtor had in the latter part of the seventh day desired to pay the debt, and had for that purpose gone to the address given by the creditor in the bankruptcy notice, she would not have found the creditor there, and would not have been able to discover where she was: *In re Stogdon*. (2) The debtor was not bound to inquire of the creditor's solicitors about her address. She was entitled to know where to find the creditor, so that she should be able to pay or secure or compound for the debt within the seven days. Indeed, the creditor when she went away from the hotel must be taken to have abandoned her temporary residence there.

Muir Mackenzie, for the creditor.

[VAUGHAN WILLIAMS L.J. We wish to hear you on the last point.]

At any rate there has been a mere irregularity or formal

(1) (1841) 3 Man. & G. 238. (2) [1895] 2 Q. B. 534.

defect, which has not caused any substantial injustice, or indeed any injustice at all, and therefore the proceedings are not invalidated: Bankruptcy Act, 1883, s. 143. The Bankruptcy Act itself contains no provision that the address of the creditor is to be stated in the bankruptcy notice; that requirement is only contained in the Form No. 6 in the Appendix to the Bankruptcy Rules. Such a merely technical objection ought not to prevail when no injury has resulted to the debtor. The fact that the debtor has made no attempt to pay or secure or compound for the debt should be taken into consideration. The debtor has not been in any way prejudiced or misled: *In re Murrieta* (1); *In re Low.* (2) In *In re Stogdon* (3) the creditor did not reside at the club which he had stated in the bankruptcy notice as his address, and he was in fact out of England during the whole of the seven days limited by the bankruptcy notice. The address given was not an address at all. Here Mrs. Watt gave the only permanent address which she had, and she left the address to which she was going with her solicitors. The notice was regular in form, and the creditor remained at the address given for a reasonable time after the service of the notice. She was not bound to be there during the whole of the seven days. No injury has been done to the debtor.

Herbert Reed, K.C., in reply. The notice was issued on July 25, and the hotel was not then the creditor's address; she did not go there till July 28, the day when the notice was served. August 3 was a Bank Holiday, and on that day money could not be obtained from a bank. The objection is not really purely technical; it might in some cases be of the greatest importance that the debtor should be able to find the creditor on the last of the seven days. Bankruptcy proceedings are of a quasi-penal nature: *In re Howes.* (4)

[ROMER L.J. Suppose a creditor was away from his house all day at his office in the City, would the bankruptcy notice be bad?]

In that case the debtor by inquiring at the house could find

(1) (1896) 3 Man. 35.
(2) [1895] 1 Q. B. 734.
(3) [1895] 2 Q. B. 534.
(4) [1892] 2 Q. B. 628, 632.

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out where the creditor was. The notice ought to state some place at which the debtor can find the creditor.

[ROMER L.J. Is it not sufficient if the address given is the creditor's bonâ fide address at the date of the issue of the notice ?]

The onus is on the creditor to shew that he has complied with the forms. Regard must be had to the substance and meaning, and not merely to the language, of the Act and rules. The address given must be a true address—that is, one at which the creditor can be found, not merely heard of: *In re Stogdon.* (1) For instance, a London man having a shooting-box in Scotland, which he only visits during the shooting season, could not properly give his Scottish address as his address in a bankruptcy notice. The address in the notice must be one at which the creditor is personally present, or at which, if he is absent, the time of his return or his present whereabouts can be ascertained. It must be an effective address, not only at the date of the issue of the notice, but also at the date of service and during the whole of the seven days.

Cur. adv. vult.

1904. Feb. 22. VAUGHAN WILLIAMS L.J. read the judgment of the Court (Vaughan Williams, Romer, and Stirling L.JJ.) as follows:—This is an appeal from a receiving order made against a divorced wife, who at the time of the making of the order was a single woman. The objections raised are three. First, that there is no judgment debt effectual as against the Court of Bankruptcy, which does not regard estoppel binding the debtor, but has a right to inquire into the real debt. Secondly, it is objected that there is no act of bankruptcy, because the act of bankruptcy relied on, which is failure to comply with a bankruptcy notice, is invalidated by the fact, as alleged, that the notice contained no such address of the judgment creditor as was intended by the Act should be given. Thirdly, it was objected that the bankruptcy notice was bad, because the amount of the judgment debt as therein stated was wrong by

(1) [1895] 2 Q. B. 534.

reason of its including interest prior to the date when the Court of Appeal amended the judgment by reducing the damages from 5000*l.* to 1500*l.*

As to the first point, undoubtedly the Court of Bankruptcy has the power on the hearing of a bankruptcy petition to go behind the judgment and to inquire into the consideration for the judgment debt, not only at the instance of the trustee, but also at the instance of the judgment debtor himself. This power is founded on s. 7, sub-s. 3, of the Bankruptcy Act, 1883, which gives the Court of Bankruptcy, on the hearing of a bankruptcy petition, a discretion for "any sufficient cause" to dismiss the petition. But, in our opinion, the fact that the judgment may be irregular or wrong in form is no sufficient reason for going behind the judgment and dismissing the petition.

The action in the present case is an action for a tort committed by a woman during coverture; it is for a libel published by her while she was a married woman.

Now, by the common law, independently of the Married Women's Property Act, 1882, a married woman was liable to be sued for a wrong committed by her, and the husband, strictly speaking, was not liable to be sued at all for the tort. His only liability was to be sued jointly with her, because of the universal rule that the wife during coverture could not be either a sole plaintiff or a sole defendant; and it was decided in *Capel* v. *Powell* (1) that a husband who had obtained a divorce was not liable to be joined in an action of tort for a tort committed by his wife during coverture.

It is manifest, therefore, that in the present case, in which the defendant at the date of the trial and judgment had been divorced, she alone remained liable for the tort, and the amendments, if any, which were required in the writ or pleadings went merely to the form and not to the substance of the cause of action. The case is very different from that of a breach of a contract entered into by a wife during coverture. In such a case coverture is a plea in bar and not in abatement, and the cause of action given by the Married

(1) (1864) 17 C. B. (N.S.) 743.

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Women's Property Act, 1882, and the remedy thereon are new, being created by Act of Parliament; whence it follows that, if the husband dies or obtains a divorce, this will not affect the statutory cause of action or the remedy thereof, but the remedy will remain a remedy against the wife's separate property, and the judgment in such an action will not create a personal debt from her, and therefore will not support a bankruptcy notice under the Bankruptcy Act, 1883, s. 4, sub-s. 1 (*g*).

It is true that in the present case we have not to deal with the setting aside of a bankruptcy notice, because the judgment in form creates a personal debt; but if, in substance, the action had been one in which no judgment could have been obtained, creating a personal debt by the wife, we are disposed to think there would have been sufficient cause to dismiss the petition. But in the present case no such question arises. It is plain that the objection to the judgment, if any, is one of form only, and the power of the Court of Bankruptcy to go behind a judgment is a power to inquire into the consideration for and not into the form of the judgment. The judgment, in our opinion, is conclusive, unless the consideration can be questioned. The first objection, therefore, fails.

The third objection—that is to say, the "interest" objection—is also concluded by the judgment. The Court of Bankruptcy cannot, we think, question the discretion of the Court in such a matter.

The only remaining objection is that founded on the insufficiency of the address given by the judgment creditor in the bankruptcy notice. The objection is based upon the judgments of the Court of Appeal in *In re Stogdon.* (1) Now in that case the judgment creditor, who was out of England at the time the notice was served, and so continued during the seven days that it was running, inserted in the bankruptcy notice as his address "White's Club, St. James's, S.W."; and the Court of Appeal decided that the bankruptcy notice was bad, holding that the notice must describe the creditor as of an address where the sum claimed can be paid to

(1) [1895] 2 Q. B. 534.

him or secured or compounded for, not merely where he could be heard of, and that the address of "White's Club" was not under the circumstances such an address; and the question which we have now to decide is whether the address given by Mrs. Watt is such an address as is required by the Act, having regard to the decision in *In re Stogdon*. (1)

Now what are the facts? Mrs. Watt appears to have been in the habit for some time of staying at the Hans Crescent Hotel whenever she came to London, but she did not continuously keep a room there. Sometimes she left an address to which her letters could be sent, sometimes she did not. At the date of the issue of the bankruptcy notice she was not in fact at the Hans Crescent Hotel; she seems to have come there on the evening of July 28, so that the seven days mentioned in the notice would not run out till the end of August 4. She left the hotel on the morning of August 4 in a motor-car, and went to Newhaven and thence to Dieppe; she did not return to England till the end of September, and she went on September 30 to the Hans Crescent Hotel. She left on August 4 no address to which her letters could be sent, and in fact they were not sent after her. In order to see whether this address fulfils the conditions laid down in *In re Stogdon* (1), we must ascertain what is the principle of that decision; and it is the more necessary to do so because it will govern the practice of the Bankruptcy Court hereafter. It is plain that it is not sufficient for the creditor merely to give an address where he can be heard of; it must be an address where he can be paid, or where by agreement the debt can be secured or compounded.

Now what does this mean? Suppose a creditor gives as his address his home where he permanently lives. Is he bound to remain at home all day, or never to go out without leaving word where he proposes to go, but, for the matter of that, might not succeed in going? This is impossible. What then are the necessary conditions of the address? We think that the address must be of a place where the creditor is to be found

(1) [1895] 2 Q. B. 534.

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during the seven days, and this is so whether that address is of the residence or of the place of business of the creditor; and we think that, if the address given in the bankruptcy notice is such an address at the date of the service of the notice, occasional absence of the creditor from that address, even for a whole day, will not render the bankruptcy notice inefficient, unless the absence is such as to deprive the debtor of a reasonable opportunity of paying the debt or securing it or compounding for it according to the terms of the notice. And we do not think that it would make any difference that the address was the temporary home of the creditor who happened to have no permanent home, or that the absence relied on as depriving the bankruptcy notice of its efficiency happened to occur on the last day of the seven.

On the other hand, we think that, if the creditor, after the service of the notice, abandoned his place of address, so that it ceased to be a place where at reasonable times the creditor could be found (or some authorized agent on his behalf) to receive payment of the judgment debt, or to deal with the question of security, the bankruptcy notice would cease to be efficient. It was urged in the present case that when Mrs. Watt started on her journey to the Continent she abandoned her temporary address and ceased to have any address where she, or any agent authorized to act on her behalf in the matter, could be found. My brethren think that, having regard to her practice of residing at the Hans Crescent Hotel, and that her letters would be likely to be delivered there after her departure, this contention on behalf of the debtor fails in fact; and I do not think I ought to differ from them on a question of fact; so this appeal will be dismissed with costs.

I wish to add that the decision of the Court of Appeal in *In re Stogdon* (1) seems to me, so far as the observations contained in the judgments are concerned, to be difficult of practical application. Perhaps it might be considered whether the rules and forms might not be somewhat altered.

On the application of the debtor,

(1) [1895] 2 Q. B. 534.

THE COURT gave her leave to appeal to the House of Lords, and stayed proceedings under the receiving order pending the appeal, on her undertaking to present her petition of appeal within fourteen days.

C. A. 1901

BEAUCHAMP, *In re.*

BEAUCHAMP, *Ex parte.*

Appeal dismissed.

Solicitors: *M. Abrahams, Sons & Co.; Charles Russell & Co.*

W. L. C.

[IN THE COURT OF APPEAL.]

C. A. 1901 *Feb.* 12.

In re HANCOCK.

Bankruptcy—Receiving Order—Adjudication—Debtor's own Petition—Committal Order, Evasion of—Abuse of Process of Court—Annulling Bankruptcy—Jurisdiction—Assets—Personal Earnings—Administration in Bankruptcy.

A creditor obtained judgment against a debtor, a furniture dealer's salesman, whose sole income was derived from his salary or wages, payable weekly, and commission on his sales. He had two children dependent upon him. On the debtor failing to pay the judgment debt, the creditor obtained, on a judgment summons, an order for payment of the debt by instalments. The instalments having fallen into arrear, the creditor obtained a committal order for the amount of the arrears, under pressure of which order the debtor paid the money. The instalments having again fallen into arrear, the creditor obtained a second committal order, whereupon the debtor, finding himself unable to comply with it, presented a bankruptcy petition, which was followed, upon his own application, by a receiving order and adjudication. The judgment creditor was his only creditor, and he had no assets beyond the personal earnings from his employment. The judgment creditor then applied for annulment of the bankruptcy proceedings on the ground that they were an abuse of the process of the Court; but the registrar refused the application. On appeal:—

Held, that the proceedings were not, in the circumstances, an abuse of the process of the Court, and in fact would not prejudice the judgment creditor, inasmuch as the personal earnings of the bankrupt, beyond what was necessary for the maintenance of himself and his family, could be applied, in the proceedings, towards payment of the judgment debt: *In re Roberts*, [1900] 1 Q. B. 122. The appeal was therefore dismissed with costs.

Semble, it was the intention of the Legislature, by the Bankruptcy

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Act, 1883, to enable a debtor, in a proper case, to relieve himself from the pressure of a committal order by obtaining an adjudication in bankruptcy against himself.

ON April 18, 1899, Messrs. Hilleary, solicitors, obtained judgment against Thomas William Hancock for 209*l.* 7*s.* 8*d.* and 4*l.* 14*s.* costs, the debt having been incurred in respect of costs for work done by them as his solicitors.

Ineffectual applications having been made to the debtor for payment of the judgment debt, Messrs. Hilleary issued a judgment summons against him.

The summons was heard before Phillimore J. on June 21, 1902, when the debtor was examined as to his position and means. It appeared that he was salesman to a firm of furniture dealers, and receiving a salary or wages of 5*l.* per week, or 260*l.* a year, together with commission at 1 per cent. on sales effected by him, his whole income being about 300*l.* a year; that he was a married man with two infant children dependent upon him, though, through no fault of his own, separated from his wife. Upon that evidence the learned judge made an order for payment of the judgment debt, together with the costs of the summons, by instalments of 4*l.* a month commencing on July 21, 1902.

The debtor having failed to comply with that order, Messrs. Hilleary served him with a second judgment summons, which came before Phillimore J. on November 1, 1902.

The debtor not appearing, an order was made for his committal for 12*l.*, being the three unpaid instalments due under the previous order. By the judge's direction notice of the order was served on the debtor, but he still failed to pay any of the instalments.

On November 14 an application was made by the debtor to Darling J. to have the second judgment summons restored to the list, but no order was made thereupon except that 3*l.* 3*s.*, the costs of the application, should be added to the judgment debt.

On the following day the debtor paid the sum of 13*l.* 16*s.* 6*d.*, being the 12*l.* for which he stood committed, and 1*l.* 16*s.* 6*d.*, the costs of the judgment summons on which the committal

order had been made, and subsequently he also paid the 3*l.* 3*s.*, the costs of the abortive application to Darling J.

As the debtor, however, still neglected to pay the monthly instalments of 4*l.*, Messrs. Hilleary issued a third judgment summons, which came before Wright J. on January 31, 1903. The debtor was then again examined as to his position and means, and was ultimately ordered to pay 16*l.*, being four monthly instalments then due, by the end of February, the monthly instalments of 4*l.* to continue as from April 1 following, but the previous order of June 21, 1902, was not otherwise varied.

The debtor paid the 16*l.*, but again neglected to pay the further monthly instalments as directed by Wright J.'s order, and on July 20, 1903, there then being 16*l.* due for four instalments, a fourth judgment summons was issued. That summons came before Wright J. on August 8, 1903, when the debtor was committed for 15*l.*, the committal being suspended for a week.

The debtor finding himself, as he alleged, unable to pay the 15*l.*, presented a bankruptcy petition, and on August 14, 1903, obtained a receiving order, and on the same day, upon his own application, an order of adjudication was made against him.

In the course of his public examination on October 21, 1903, the bankrupt stated that Messrs. Hilleary were his only creditors, and he admitted that he had filed his petition for the purpose of defeating the committal order of August 8, 1903, he not having the means to meet it. He stated his income as being about 300*l.* for salary and commission.

In his report dated January 13, 1904, the official receiver reported that the bankrupt's only creditors were Messrs. Hilleary for 212*l.* 19*s.* 9*d.*, and that he appeared to have no available property or assets.

Messrs. Hilleary then served the official receiver and the bankrupt with a notice of motion before the registrar to have the order of adjudication annulled on the grounds—(1.) that the bankrupt was not insolvent at the date of the presentation of his petition; (2.) that the applicants were his only creditors, and that the petition was presented for the purpose of defeating

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them; and (3.) that the bankruptcy proceedings were an abuse of the process of the Court.

The motion was heard before the registrar on January 20, 1904, when he dismissed it with costs, holding that the case fell within *Ex parte Painter*. (1)

Messrs. Hilleary appealed.

The appeal was heard on February 12, 1904.

Herbert Reed, K.C., and *S. Lynch*, for the appellants. This petition was presented for the express purpose of defeating the committal order, and was therefore an abuse of the process of the Court. *Ex parte Painter* (1), upon which the registrar decided this case, is distinguishable. There there were assets, though small; here there are none. Again, in that case there was no actual committal order such as we have here; but even there it was with reluctance that the Court came to the conclusion that the facts were not sufficient to justify an order setting aside the whole proceedings. The case which really covers the present is *In re Betts* (2), where, under similar circumstances, the receiving order was rescinded. A debtor ought not to be able to render a committal order useless by presenting a petition, when the order is one that he can comply with, as it is submitted is the case here.

Again, the bankrupt's salary being in the nature of weekly wages, it cannot be administered in bankruptcy, but under a committal order it can. Where a committal order has been made against a debtor, he cannot, for the purpose of getting rid of its effect, present a bankruptcy petition unless the Court has an estate to administer and creditors to pay.

Although s. 8, sub-s. 1, of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), says that the Court "shall" make a receiving order upon a debtor's petition alleging his inability to pay his debts, yet the Court still has a discretion, so that, if it sees that the presentation of the petition is an abuse of the process of the Court, it may refuse to make the order. So also, where the proceedings are not for the purpose of administering any estate, the Court may set them aside. Sects. 7, 8, 9, and 10

(1) [1895] 1 Q. B. 85. (2) [1901] 2 K. B. 39.

shew that the Act is dealing with cases in which there is an estate to be administered.

[VAUGHAN WILLIAMS L.J. It seems to me that what remains of the bankrupt's salary after what is necessary for the maintenance of himself and his family can be administered by the Court: *In re Graydon.* (1)]

The only way to reach his salary is under s. 53.

[*Muir Mackenzie*, for the bankrupt, mentioned, on that point, *In re Shine.* (2)]

Muir Mackenzie, for the bankrupt. This is really an a fortiori case to that of *Ex parte Painter* (3), because the pension there in question was inalienable, so that the Court could make no order upon it. The reluctance shewn by the Court in arriving at the conclusion it did arose from the fact that the clear object of the debtor was to defeat his creditor altogether. But that is not the case here. It has been decided that a bankrupt's earnings, after making provision for the maintenance of himself and his family, are assets in the bankruptcy: *In re Roberts* (4); *Shoolbred* v. *Roberts.* (5) Those assets are strongly guarded, for, under s. 8, sub-s. 2, of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), the bankrupt cannot obtain his discharge until after a full consideration by the Court of his application. *In re Betts* (6) is a different case, for there it was found that the bankrupt had "adopted the device of filing his petition in bankruptcy as part of a scheme or system by which he was enabled to become a professional bankrupt," and "to assist him in his frauds on his creditors."

Sect. 8, sub-s. 1, of the Bankruptcy Act, 1883, requires that the Court "shall" make a receiving order upon the debtor's own petition, unless of course the Court finds that there is an abuse of its process. Now there is no ground for suggesting in the present case that the presentation of this petition was such an abuse as there was in *In re Betts* (6), and it is not open to the criticism in the judgments in *Ex parte Painter.* (3)

(1) [1896] 1 Q. B. 417.
(2) [1892] 1 Q. B. 522.
(3) [1895] 1 Q. B. 85.
(4) [1900] 1 Q. B. 122.
(5) [1900] 2 Q. B. 497.
(6) [1901] 2 K. B. 39.

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It was perfectly justifiable for this debtor to seek the protection of the bankruptcy law, and avoid being sent to prison with the inevitable result that he would be dismissed from his employment.

VAUGHAN WILLIAMS L.J. In my opinion the decision of the registrar is perfectly right; and I do not think that there is any ground here for saying that in the making of the receiving order upon the debtor's own petition there was any abuse of the process of the Court. It was decided in *In re Roberts* (3)—I am reading from the head-note—that "Under s. 44 of the Bankruptcy Act, 1883, which vests in the trustee all property belonging to the bankrupt at the commencement of the bankruptcy or acquired by him before his discharge, all personal earnings of the bankrupt between the commencement of his bankruptcy and his discharge belong to the trustee, save only what is necessary for the support of the bankrupt and his family." Now under the circumstances of the present case, and having regard to that decision, which was by no means the first decision to that effect, it is quite plain that, so far as concerns the payment of the debts due to this creditor out of the assets arising from the personal earnings of the bankrupt, there will be nothing brought about by the adjudication which ought to prejudice this creditor in any degree. The very money which he seeks to get by obtaining from time to time a committal order will come to him by reason of the adjudication. Under these circumstances it seems to me impossible to say that the presentation of this petition was an abuse of the process of the Court. It is true that the result of the receiving order will be that this debtor will not be liable to pressure from time to time by the obtaining of a committal order against him; but I am not at all prepared to say that the Legislature did not intend that a debtor who had been subjected to such pressure should relieve himself from that pressure by obtaining an adjudication in bankruptcy against himself. This is not a case in which the debtor would be achieving the result of relieving himself from payment of this debt to this solicitor-creditor. It seems to me, on the contrary,

that this debt will be paid to the creditor, and that by the statutory means which the Legislature intended to be applied to such a case as this. Accordingly, I do not think that the presentation of this petition was an abuse of the process of the Court, and the appeal must be dismissed with costs.

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STIRLING and COZENS-HARDY L.JJ. concurred.

Appeal dismissed.

Solicitors: *R. J. Gooch; Thomas Charles.*

G. I. F. C.

[IN THE COURT OF APPEAL.]

C. A. 1904 *Feb.* 24.

KAUFMAN *v.* GERSON.

Conflict of Laws—Contract obtained by Duress Abroad—Threat of Prosecution—Contract not illegal where made.

An English Court will not enforce a foreign contract, though valid by the law of the country in which it was made, in cases where the Court deems the contract to be in contravention of some essential principle of justice or morality.

The plaintiff, who was domiciled in a foreign country, sued on a contract made in that country between himself and the defendant, a woman likewise domiciled there, whom he had coerced into signing the contract by threats of a criminal prosecution against her husband for an offence which he had committed, the consideration for the contract being that the plaintiff would not prosecute the husband. Evidence was given to the effect that the contract was not invalid by the law of the country in which it was made:—

Held, that, even assuming that to be so, the Court would not enforce a contract so procured.

APPEAL from the judgment of Wright J. in an action tried by him without a jury. (1)

The action was brought to recover a sum of 134*l.* 9*s.* 1*d.* upon an agreement made by the defendant as after mentioned.

The defendant was the wife of one Gerson, to whom the

(1) [1903] 2 K. B. 114.

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plaintiff had entrusted money for a certain purpose in France, where both parties were then domiciled. Gerson appropriated part of the money to his own use, instead of applying it to the purpose intended. It appeared that his conduct in so misappropriating the money amounted to a criminal offence by the law of France. In order to prevent a prosecution of her husband, and the dishonour of the name borne by her children, the defendant, who had property of her own, at the instance of the plaintiff, and under the influence of threats made by him of a criminal prosecution, signed an agreement with the plaintiff in Paris, by which, in consideration of the plaintiff's forbearing to prosecute her husband, she agreed that she would within a period of three years pay to the plaintiff the amount misappropriated by her husband. According to the uncontradicted evidence of an expert in French law such an agreement was not invalid by the law of France, either on the ground that it was an agreement for the compromise of a criminal charge, or on the ground that it was obtained by duress or undue influence. The defendant at various dates had paid to plaintiff under the agreement sums amounting altogether to 801*l.* 11*s.* 7*d.* The action was brought to recover the balance alleged to be due under the agreement. The defendant counter-claimed for a return of the money already paid by her. The learned judge gave judgment for the plaintiff on the claim and the counter-claim.

Montague Shearman, K.C., and *Eustace G. Hills*, for the defendant. The contract sued upon is not enforceable in an English Court on two grounds: first, because it was an agreement the object of which was to interfere with the course of justice; and, secondly, because it was obtained by the plaintiff from the defendant by moral coercion amounting to duress. The doctrine that a contract which is valid by the law of a foreign country where it is made may be enforced in this country, though it would not be valid if made here, is subject to the exception of cases where the contract is contrary to what the English law deems a general principle of morality or the public interest. A contract to interfere with the course of

justice, or a contract which a person has made, not as a free agent, but under coercion, whether by threat of physical violence or by moral pressure, such as was exercised in the present case, is contrary to what the English law deems a general principle of morality.

[They cited *Santos* v. *Illidge* (1); *In re Missouri Steamship Co.* (2); *Quarrier* v. *Colston* (3); *Robinson* v. *Bland* (4); *Biggs* v. *Lawrence* (5); *Grell* v. *Levy* (6); *Hope* v. *Hope* (7); *Rousillon* *Rousillon.* (8)]

Montague Lush, K.C., and *Israel Davis*, for the plaintiff. Taking the second point raised by the defence first, it is submitted that the contract was not in this case procured by any such duress or coercion as to render it contrary to morality or general principle that it should be enforced by an English Court. Assuming that an English Court would not under any circumstances enforce a contract which had been obtained by physical violence or the threat of it, there was nothing analogous to that kind of coercion here. A party contracting cannot be said not to be a free agent, merely because there is a very strong motive for entering into the contract. Unless it can be said that any contract made in order to avoid a prosecution is a contract obtained by coercion, it is difficult to see how this contract can be said to have been so obtained. The question is not whether the contract could have been enforced, if made in this country; it is whether a contract governed by French law, and which is not invalid by that law, is under the circumstances of this case so contrary to some general principle of morality that an English Court will refuse to enforce it. Suppose a judgment had been obtained on this contract in France, and an action had been brought on that judgment in this country, could that judgment have been said to be so contrary to natural justice that the Court could not enforce it? It is submitted that it could not. It is contended that an

(1) (1859) 6 C. B. (N.S.) 841; (1860) 8 C. B. (N.S.) 861.
(2) (1888) 42 Ch. D. 321.
(3) (1842) 1 Ph. 147; 65 R. R. 351.
(4) (1760) 1 Wm. Bl. 256.
(5) (1789) 3 T. R. 454; 1 R. R. 740.
(6) (1864) 16 C. B. (N.S.) 73.
(7) (1857) 8 D. M. & G. 731.
(8) (1880) 14 Ch. D. 351.

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English Court cannot refuse to enforce a foreign contract which is valid according to the law of the country where it was made, except upon some general principle which prevails in all civilized countries. The question what amounts to duress or coercion is one of degree, as to which the laws of civilized countries may within certain limits reasonably differ.

[They cited *Jones* v. *Merioneth Permanent Benefit Building Society* (1); *Williams* v. *Bayley* (2); Story's Conflict of Laws, 7th ed. §§ 245, 258, pp. 282, 292; Dicey's Conflict of Laws, pp. 32, 766.

[ROMER L.J. referred to Westlake on Private International Law, 3rd ed. § 215, p. 260.

THE COURT intimating that they were against the plaintiff on the second point, the plaintiff's counsel did not argue the first point.]

Montague Shearman, K.C., for the defendant, was not called upon to reply. (3)

COLLINS M.R. This is an appeal from a judgment of Wright J., which raises an important question. The defendant, who is the wife of one Gerson, was induced, as the learned judge has found, by threats of a criminal prosecution against her husband in France to give to the plaintiff an undertaking to pay a considerable sum of money. The amount of 801*l.* 11*s.* 7*d.* has been already paid by the defendant under that agreement, by instalments spreading over a series of years, leaving a balance still unpaid for which the plaintiff sues the defendant in this action. Two points are raised by way of answer to the action. First, it is said that the agreement upon which the action is brought is bad because the object of it was to stifle a prosecution. Secondly, it is said that it was bad as having been obtained by duress. The learned judge,

(1) [1892] 1 Ch. 173.

(2) (1866) L. R. 1 H. L. 200.

(3) The Court did not express any opinion as to the counter-claim, inasmuch as the defendant was willing not to press that, without prejudice to her right to insist upon it if the plaintiff appealed to the House of Lords.

upon the evidence given by an expert as to the French law on the subject, came to the conclusion on the first point that, according to that law, such an agreement was not invalid on the ground that its object was to stifle a prosecution; and that, the agreement in this case having been made in France by persons domiciled there, and being intended to be performed in that country, the point taken by the defendant afforded no ground for an English Court's refusing to enforce the agreement, and therefore so far the defence failed. The second point raised was, as I have said, that the defendant was induced to enter into the agreement under such circumstances that an English Court would not enforce it, as having been obtained by coercion. That point involves the question of fact whether the defendant has succeeded in establishing that the agreement was so obtained. It appears to me that Wright J. arrived at the conclusion that she had so succeeded. He says in his judgment: "The facts are in brief these. The plaintiff Kaufman in France placed in the hands of Gerson, as a friend whom he wished to assist, a sum of money to be used in buying skins to be dressed and sold for their joint benefit. Gerson appropriated part of the money to his own use instead of applying it in buying skins. His conduct was criminal in France and a prosecution was threatened. In order to avoid a prosecution, and to protect the good name of Gerson's children, his wife, the present defendant, under the influence of Kaufman's threat, and at his instance, agreed in writing to make good by instalments out of her own property the amount of the defalcation on the express terms that there should be no prosecution on the part of Kaufman." The learned judge's note of the defendant's evidence appears to me entirely to bear out the conclusion at which he arrived. It was suggested, in answer to the defendant's contention, that, she and her husband having been married in France under the Code Napoléon with community of goods, and there being no settlement of her property, her husband's liabilities could have been enforced against it civilly. But, however that may be, the plaintiff was not content with such remedies as he might have by the French law under those circumstances, but desired to obtain

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some further advantage, which he forced the defendant to concede by the strongest possible moral pressure, namely, by the threat of bringing dishonour upon her name and that of her children. Yielding to that pressure she consented to sign the agreement, and has paid considerable sums of money under it. It is quite obvious that down to the year 1902 those payments were made under the continual threat of criminal proceedings being instituted; and it was not until the defendant was driven by civil proceedings in this country to do so, that she set up this defence as an answer to the plaintiff's claim for the balance of the money agreed to be paid.

I think that the real point in this case is whether an agreement obtained under such circumstances can be enforced in an English Court. I do not propose to deal with the first point raised, namely, that the agreement, being one which interfered with the course of justice, could not be enforced in an English Court. The law of France with regard to such agreements is said to differ from that of England. I am not prepared to say that, so far as this point is concerned, the agreement in this case, if valid according to the law of France, may not be enforced by an English Court; but I express no final opinion on the matter one way or the other. I propose to decide this case on the second point raised, which, as I have said, appears to me to be the real point in the case.

It is said that by the law of France an agreement obtained by moral pressure, such as was exercised in the present case, can be enforced. The view of the learned judge seems to have been that, though there was in this case such pressure as would amount to coercion, and render an agreement unenforceable, according to English law, nevertheless, an agreement so procured being valid according to the French law, this agreement could be enforced by an English Court. He said in giving judgment: "The second ground on which the contract in the present case is impeached is that it was obtained by the undue influence or duress of a threat to prosecute the husband for crime. If this objection is to be regarded as based on considerations of public policy, the same answer applies as in the case of the first objection. It seems, however, to be more

in the nature of an objection to the proof of consent of the defendant to the contract, a consent induced by duress or undue influence being by English law treated as no consent. If this be the correct view, it would seem that the law of the country in which the contract is made and is to be performed and in which the parties are domiciled, ought to prevail, unless there is such duress as must be considered to avoid the contract under any but unreasonable and uncivilized institutions of law—a description which would be applicable to such a case as that of consent obtained, e.g., by physical torture or by the use of drugs, but which cannot properly be applied to this case." The whole point of the judgment appears to be contained in the last few lines. The judge seems to admit that, if the agreement had been obtained by the threat of physical violence, e.g., by threatening the defendant with a pistol, or something of that kind, the case would be brought within a general principle, upon which the Court would be entitled to refuse to enforce the contract, whatever might be the law of any other country on the subject; and it was not denied by the plaintiff's counsel that this would be so. But, if so, what does it matter what particular form of coercion is used, so long as the will is coerced? Some persons would be more easily coerced by moral pressure, such as was exercised here, than by the threat of physical violence. It seems to me impossible to say that it is not coercion to threaten a wife with the dishonour of her husband and children. It is argued that it is only upon some principle which is recognised and applied in all civilized countries that an English Court can refuse to enforce a contract which is valid and enforceable according to the law of the country where it was made; and, therefore, although there may be a principle upon which an English Court would refuse to enforce such a contract as this, if made in England, if there is any civilized country, the law of which does not accept that principle, an English Court is debarred from acting upon it. I cannot accept that view. The authorities which have been cited do not appear to me to bear it out. The plaintiff's counsel cited two passages from Story's Conflict of Laws, which appear to me to shew that, where an English Court is

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asked to enforce a contract made in a foreign country, it is entitled to inquire whether, though the contract may be valid according to the laws of that country, it violates some moral principle, which, if it is not, ought to be universally recognised. I think that in this case, as in other cases, the principle applies that a plaintiff, who seeks the assistance of the Court, must come with clean hands; and, if the plaintiff is setting up a contract obtained in a manner which, in the case of an English contract, the law deems contrary to morality, an English Court will not help him to enforce it, whatever may be the law of the country in which the contract was made. I think the principle which I am endeavouring to express is well established by authority. There is the passage, which was cited, in paragraph 258 of Story's Conflict of Laws, 7th ed. p. 292, where the learned author says with regard to all contracts which in their own nature are founded in moral turpitude or are inconsistent with the good order and solid interests of society: "All such contracts, even though they might be held valid in the country where they are made, would be held void elsewhere, or at least ought to be, if the dictates of Christian morality, or of even natural justice, are allowed to have their due force and influence in the administration of international jurisprudence." Romer L.J. has referred to a passage in Westlake on Private International Law, 3rd ed. § 215, p. 260, where the learned author says: "Where a contract conflicts with what are deemed in England to be essential public or moral interests, it cannot be enforced here, notwithstanding it may have been valid by its proper law. The plaintiff in such a case encounters that reservation in favour of any stringent domestic policy, with which alone any maxims for giving effect to foreign laws can be received . . . . The difficulty in every particular instance cannot be with regard to the principle, but merely whether the public or moral interests concerned are essential enough to call it into operation; and where a breach of English law is not contemplated, this is necessarily a question on which there is room for much difference of opinion among judges." Here, the question, which arises in the particular case, is whether a

contract obtained by such moral pressure as was brought to bear on the defendant is one which an English Court ought not to enforce, even if it would be enforced by the Courts of a foreign country in which it was made. It appears to me that the principle upon which English Courts act in refusing to enforce such a contract is one which, if it is not, ought to be universally recognised; and I do not think that this Court ought to violate that principle, even on the assumption that this contract could have been enforced by the law of France. The decision which I am pronouncing does not appear to me to be inconsistent with any of the decisions to which our attention has been called; on the contrary, it is, I think, supported by several cases, or at any rate by weighty dicta therein, as for instance by the observations of Turner L.J. in *Hope* v. *Hope* (1), with which Knight Bruce L.J. appears to have agreed, and by those of Fry J. in *Rousillon* v. *Rousillon*. (2) On the broad general principle that the Court will not enforce a contract which has been obtained by means of such moral coercion as was here used, I think the defendant is entitled to the protection of an English Court, and that we ought to refuse to enforce a contract which ought never to have been made.

ROMER L.J. I am of the same opinion. The principle of law applicable to this case appears to me to be succinctly and accurately stated in the passage from Westlake on Private International Law, which has been read by the Master of the Rolls. The only question is as to the application of that principle to the facts of the present case. Shortly stated those facts appear to amount to this, namely, that the plaintiff extorted a contract from a wife by threats of criminal proceedings against her husband, if she did not comply, those proceedings being such that, if taken, they would probably have resulted in the ruin of the husband, and the disgrace of his wife and children. That being so, the principle to which I have referred, in my opinion, applies. I think that to enforce a contract so procured would be to contravene what

(1) 8 D. M. & G. 731. (2) 14 Ch. D. 351.

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by the law of this country is deemed an essential moral interest; and therefore that the Court ought not, at the instance of the plaintiff, to assist him in this case to enforce a contract which he has obtained by such means.

MATHEW L.J. I agree. The policy of the English Courts in such cases appears to have been to refuse the assistance of the law to a litigant seeking to enforce a contract that he has obtained by means which the Court regards as unjust and immoral. In this case the execution of the contract sued upon was, in my opinion, obtained by such means; for the evidence shews that pressure which amounted to torture was applied in order to coerce the defendant into signing the contract. I think it would be a violation of principle, if this Court were to allow its process to be used to enforce a contract so procured.

Appeal allowed.

Solicitors for plaintiff: *Leggatt, Rubinstein & Co.*
Solicitors for defendant: *Dixon, Weld & Dixons.*

E. L.

[IN THE COURT OF APPEAL.]

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March 7.

GRAY AND OTHERS *v.* BONSALL.

Landlord and Tenant—Lease—Forfeiture for Non-payment of Rent—Under-lessee—Relief against Forfeiture—Conveyancing and Law of Property Act, 1892 (55 & 56 *Vict. c.* 13), *s.* 4—*Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 14, *sub-s.* 8—*Common Law Procedure Act*, 1860 (23 & 24 *Vict. c.* 126), *s.* 1.

Sect. 4 of the Conveyancing and Law of Property Act, 1892, is not a mere amendment of s. 14 of the Conveyancing and Law of Property Act, 1881, extending the provisions of that section to underlessees, but an independent provision for affording relief to underlessees against forfeiture for breach of any covenant in the head lease, and therefore relief can be given under s. 4 to an underlessee against a forfeiture of the head lease for non-payment of rent.

APPEAL from an order made by Bucknill J. at chambers as after mentioned.

In September, 1858, the executors and legatees of one John Mott granted two leases for terms of sixty years respectively to one Woods, one of them being a lease of an hotel called the Castle and Falcon, situated in Aldersgate Street, and the other being a lease of a yard situated behind the hotel. There was a covenant in the last-mentioned lease by the lessee to erect buildings to a certain value on the demised premises and to keep the same in repair. The lease of the yard reserved a yearly rent of 300*l.*, and contained a condition for re-entry if the rent reserved were in arrear for the space of twenty-one days. The lease of the hotel reserved a yearly rent of 800*l.*, and a further yearly rent or sum of 300*l.*, if the lessee did not pay, on the days on which the same should become due, or within twenty-one days after such days the rent of 300*l.* reserved by the lease of the yard, and there was a condition for re-entry, if the said rent of 800*l.*, or the said additional sum of 300*l.*, in case the same became payable, should be in arrear for the space of twenty-one days. By an underlease dated September 30, 1858, Woods demised the yard to the Midland Railway Company for the residue of the term of sixty years less twenty-one days. Shortly afterwards Woods assigned

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both the leases to one Bonsall, subject as to the yard to the underlease to the Midland Railway Company. In 1903, the Michaelmas rent on both leases being in arrear, the persons in whom the reversion on the leases respectively was vested brought an action against Bonsall to recover possession of the premises comprised in both leases for non-payment of rent, and obtained judgment for possession of the premises in default of appearance. The Midland Railway Company, as underlessees, applied to Bucknill J. at chambers for relief against the forfeiture as regards the premises comprised in the underlease to them. Neither the original lessee nor Bonsall was made a party to that application. Before the judge the counsel for the lessors said that he made no objection on their part on the ground that Bonsall was not made a party. The learned judge ordered that relief should be granted to the Midland Railway Company against the forfeiture of the lease as regards the property comprised in the underlease to them, upon the terms that they should pay all rent in arrear in respect of the said property, and all costs sustained by the plaintiffs in relation thereto.

Montague Lush, *K.C.*, and *B. A. Cohen*, for the plaintiffs. It is submitted that neither under the Common Law Procedure Act, 1860, s. 1, nor under the Conveyancing and Law of Property Act, 1892, s. 4, was the learned judge entitled to make the order which he made. He appears to have intended to act under the Common Law Procedure Act, 1860, s. 1; for he did not make any order vesting the property in the underlessees, or for the execution of any deed creating privity between them and the plaintiffs, as required by s. 4 of the Conveyancing and Law of Property Act, 1892. He had no jurisdiction to give any relief under the latter Act. The Conveyancing and Law of Property Act, 1881, s. 14, contains certain provisions for the relief of lessees against forfeiture, but by sub-s. 8 of that section it is provided that the section shall not affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent. It was held in *Burt* v. *Gray* (1)

(1) [1891] 2 Q. B. 98.

and *Nind* v. *Nineteenth Century Building Society* (1) that an underlessee was not, as between himself and the original lessor, a lessee within the meaning of s. 14 of the Act of 1881. Sect. 4 of the Conveyancing and Law of Property Act, 1892, was passed in order to amend the law in that respect, and to extend the provisions of s. 14 of the Act of 1881 to underlessees. By s. 1 of the Act of 1892 it is to be read together with the Act of 1881, and s. 4 of the later Act must be construed as subject to the same limitation as s. 14 of the earlier Act which it amends, namely, that it is not to affect the law with regard to forfeiture for non-payment of rent and relief therefrom. It cannot have been intended that there should be power to give relief against forfeiture for non-payment of rent to an underlessee under the Act of 1892 when no such relief could be given under the Act of 1881 to the lessee: or that there should be separate, and inconsistent, provisions for relief in the case of such forfeiture under the Common Law Procedure Act, 1860, and the Conveyancing and Law of Property Acts, 1881 and 1892. The case of *Imray* v. *Oakshette* (2) is not an authority against the plaintiffs. There the forfeiture was for breach of a covenant not to assign without licence from the lessor, and the case therefore came within sub-s. 6 of s. 14 of the Conveyancing and Law of Property Act, 1881. There is not the same reason, however, for supposing that s. 4 of the Act of 1892 was intended to be subject to the limitation imposed by sub-s. 6 of s. 14, as there is for supposing that it is subject to the limitation imposed by sub-s. 8 of s. 14, in respect of relief against forfeitures for non-payment of rent, for which a distinct and independent code is provided by the Common Law Procedure Act, 1860.

Assuming that the order of the learned judge was made under the Common Law Procedure Act, 1860, s. 1, it is submitted that it was wrongly made for more than one reason. That section only enabled the relief, which might be given under the old Chancery jurisdiction, to be given in a summary way by a common law Court; and, though under it relief might be given to an underlessee, it could only be given to him

(1) [1894] 2 Q. B. 226. (2) [1897] 2 Q. B. 218.

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according to the doctrine of equity on the subject, as standing in the shoes of, and undertaking all the liabilities of, his lessor, the original lessee. Having regard to the character and position of the demised premises in this case, and the peculiar terms of the condition for re-entry in the lease of the hotel, these leases ought not to be looked upon as distinct and independent leases; and relief could not have been granted to Bonsall against the judgment so far as one only of them was concerned on the footing that they were to be treated as separate. Therefore the underlessees cannot claim relief against the judgment as regards the premises underlet to them separately. Secondly, it is clear that, on an application under the Common Law Procedure Act, 1860, relief cannot be given to an underlessee in the absence of the original lessee: *Hare* v. *Elms*. (1) No doubt, at chambers no objection was taken on the ground that Bonsall, the assignee of the leases, was not made a party to the application; but it is difficult to see how the relief to be given can be worked out in his absence, and that of the original lessee. There is no privity between the plaintiffs and the underlessees; and it would seem that the relief must be given on the footing that the original lease of the yard is to be restored to existence, but that would apparently involve a re-creation of the liability of the lessee and that of the assignee of the lease, which were at an end by the forfeiture. If so, it would appear that they must be brought before the Court before any order can properly be made.

[They also cited *Wardens of Cholmeley School, Highgate* v. *Sewell*. (2)]

Neville, K.C., and *C. H. Sargant*, for the underlessees. The order made by the learned judge is equally capable of being supported, whether it is regarded as made under the Common Law Procedure Act, 1860, or as made under the Conveyancing and Law of Property Act, 1892, s. 4. The case of *Imray* v. *Oakshette* (3) is clearly fatal to the contention that s. 4 of the Conveyancing and Law of Property Act, 1892, was merely passed to amend s. 14 of the Act of 1881 by making it applicable

(1) [1893] 1 Q. B. 604. (2) [1894] 2 Q. B. 906.
(3) [1897] 2 Q. B. 218.

to underlessees, and shews that it is an independent section providing for the relief of underlessees in all cases of forfeiture for breach of covenants in the head lease, including non-payment of rent. Assuming the order to have been made under the Common Law Procedure Act, it is submitted that, under the circumstances, no objection can be taken on the ground of want of parties; and there is no need of any fresh deed to create privity between the plaintiffs and the underlessees. The original lessee, Woods, assigned the leases long ago, and has no interest in the premises; and there cannot be any substantial question of liability on his part or that of his representatives. Bonsall was the defendant in the action, and made default in appearance, and the plaintiffs' counsel waived any objection on the ground that he was not made a party at chambers. In *Hare* v. *Elms* (1) there had been no assignment of the lease. Woods could not have objected to relief being given to Bonsall, his assignee, on the ground that it would involve him in liability; nor could Bonsall say that his underlessee ought not to be relieved, on the ground that it might involve him in liability. Relief was granted in equity in such cases on the footing that the head lease was restored; and an underlessee claiming relief against a forfeiture could only get it on the footing that he undertook as between himself and the lessors all the liabilities of the persons through whom he derived his title as regards the premises demised to him. The application for relief was made generally, and it is open to this Court, if they think it desirable, to grant relief under the Conveyancing and Law of Property Act, 1892, on such terms as they think fit. The lease of the yard is quite separate from that of the hotel, and the terms of the latter have nothing to do with the case.

M. Lush, K.C., in reply. If relief is to be granted on the footing that a new lease of the premises is to be made as between the plaintiffs and the underlessees for the term of the underlease, it ought to be made a condition that, if the premises are out of repair, they should be put into repair. [He cited *Ewart* v. *Fryer*. (2)]

(1) [1893] 1 Q. B. 604.

(2) [1901] 1 Ch. 499.

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ROMER L.J. I think that the learned judge was right in ordering that relief should be given to the underlessees in this case, but I am not satisfied that he has given relief in quite the right form. It appears to me that, on the main question argued before him, namely, whether the lease of the yard was to be treated as a separate lease, he was right, and the appeal fails. So far as persons claiming under the lease of the yard are concerned, that lease must in my opinion be treated as wholly unconnected with the lease of the hotel, and none the less so because of the special provision in the lease of the hotel enabling the lessors to re-enter and determine that lease if the rent payable under the lease of the yard was in arrear. That provision only affected persons claiming under the lease of the hotel, and not persons claiming under the lease of the yard. I think therefore that the learned judge was clearly right in holding that, for the purposes of this application, only the lease of the yard must be considered.

It is clear to my mind that relief might be granted to the underlessees in this case, either under the Common Law Procedure Act, 1860, or under the provisions of s. 4 of the Conveyancing and Law of Property Act, 1892; but, if relief had to be given under the Common Law Procedure Act, 1860, then, having regard to the procedure under that Act, I think difficulties might, in the circumstances, arise, which may be avoided by simply applying the provisions of s. 4 of the Act of 1892. Difficulties might arise, as it seems to me, with regard to the position of the original lessee and that of the assignee of the lease, if the provisions of s. 4 of the Act of 1892 were not acted on, and unless a new lease were executed by the underlessees so as to create privity between them and the original lessors. If relief simply were granted under the Common Law Procedure Act, 1860, probably the effect would be that the original lease would have to stand, the underlessees being in that case under no direct liability to the original lessors, and the liability of the original lessee and that of the assignee of the lease continuing to exist. This course does not seem a convenient one to adopt, having regard to the fact that neither the original lessee, nor the assignee of the lease, is before the

Court as a party to the application. The lessors appear to have waived any objection on the ground that the assignee of the lease was not before the Court; but, even so, I think there might be a difficulty in granting relief under the Common Law Procedure Act, 1860, in his absence.

But by s. 4 of the Conveyancing and Law of Property Act, 1892, a provision of a general nature for the relief of underlessees was enacted, which is capable of most useful application to cases of this kind, and which avoids the difficulties I have mentioned. It has been argued that this section does not provide for any extension of the relief which could have been given to underlessees in cases of forfeiture for non-payment of rent under the old jurisdiction of the Court of Chancery or the Common Law Procedure Act, 1860. That argument was founded upon sub-s. 8 of s. 14 of the Conveyancing and Law of Property Act, 1881, which provides that "this section shall not affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent." It is contended that this sub-section must be imported into the provisions of s. 4 of the Conveyancing and Law of Property Act, 1892, and therefore that section gives no powers of affording relief to an underlessee in the case of a forfeiture for non-payment of rent beyond those which already existed before the Act of 1881. In my opinion s. 4 of the Act of 1892 is not a mere amendment of s. 14 of the Act of 1881 as suggested; but, on the contrary, is a general enabling clause, by which the Court is empowered to give relief to an underlessee in the case of forfeiture under any covenant, proviso, or stipulation in a lease, on such conditions as appear to the Court to be just. I think this view is supported by the decision of the Court of Appeal in *Imray* v. *Oakshette*. (1) There a question similar to that in the present case arose as to the effect of sub-s. 6 of s. 14 of the Conveyancing and Law of Property Act, 1881, which provides that the section is not to apply to the case of a forfeiture for breach of a covenant not to assign or underlet; and, as in the present case, it was contended, that being so, that s. 4 of the Act of 1892 did not enable the Court to grant relief against such a

(1) [1897] 2 Q. B. 218.

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Romer L.J.

forfeiture on an application by an underlessee, inasmuch as no such relief could have been granted on an application by the lessee. That argument failed, and the Court held that s. 4 of the Act of 1892 was not a mere amendment of s. 14 of the Act of 1881, and that they had jurisdiction to grant relief to the underlessee, though the forfeiture was for breach of a covenant not to assign without a licence from the lessor, and therefore no relief could have been given to the lessee under s. 14 of the Act of 1881. If the judgments of Lopes L.J. and Rigby L.J. are looked at, it will be found that, after carefully considering the sections, they came to the conclusion that s. 4 of the Act of 1892 was a substantive, independent provision, and could not be treated as limited by reference to s. 14 of the Act of 1881. That being so, I think the argument against the application of s. 4 in this case falls to the ground, and that the proper course, in giving relief to the underlessees, is to proceed under that section, by vesting the premises in them for the term of the underlease, they covenanting with the lessors during that term to pay the rent reserved by the lease, and to perform the covenants therein contained as to the demised premises. In that view it appears unnecessary to bring either the original lessee or the assignee of the lease before the Court. It was urged for the lessors that there may have been breaches of the covenants for repair contained in the original lease, and that before any vesting order is made, or any deed is executed by the underlessees under such an order, such breaches ought to be made good by the underlessees. I agree that, if there are any such breaches, they ought to be made good as a condition of granting relief to the underlessees. But, as it is not at present clear that there are any, I think the case ought to go back to chambers, in order that the matter may be investigated, on the understanding that any application by the lessors, with a view to establishing the existence of such breaches, must be made without delay. If the lessors succeed in shewing the existence of such breaches, then it must be made a condition of granting relief that they should be made good. Otherwise relief must be granted on the terms which I have mentioned. The case must go back I think to chambers to settle the details of the deed to

be executed by the underlessees, and the exact form in which the final order for relief is to be drawn up.

MATHEW L.J. I am of the same opinion. I confess that I am not satisfied that, even if the case depended on the provisions of the Common Law Procedure Act, 1860, it must be regarded as an absolutely imperative rule that a person in the position of the original lessee under the lease must be brought before the Court upon such an application. I should have thought that the Court had a discretion as to that matter. But that difficulty and any others, which might possibly have arisen under the Common Law Procedure Act, 1860, are, in my opinion, got rid of by the provisions of s. 4 of the Conveyancing and Law of Property Act, 1892. That section appears to me to be an independent enactment, which must be construed according to the plain meaning of its terms. It follows that there must be an order vesting the premises in the underlessees for the term of the underlease, and a deed must be executed by them, as pointed out by ROMER L.J., binding them to pay the rent to the lessors, and perform the covenants. The other points of detail involved must be settled in chambers, unless the parties can agree as to the terms of the order to be made.

Order varied.

Solicitors for plaintiffs: *Druces & Atlee.*
Solicitors for underlessees: *Beale & Co.*

E. L.

1903
Dec. 9.

NOKES AND ANOTHER *v.* CORPORATION OF ISLINGTON (No. 1).

London—Public Health—Water-closet Accommodation—Validity of By-law—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *ss.* 37, 39.

A by-law with respect to water-closet accommodation made by the London County Council under the provisions of s. 39, sub-s. 1, of the Public Health (London) Act, 1891, required the landlord or owner of any lodging-house to provide and maintain in connection therewith water-closet, earth-closet, or privy accommodation in the proportion of not less than one water-closet, earth-closet, or privy for every twelve persons, and a penalty was provided for any offence against the by-law:—

Held, that the by-law was unreasonable and bad, because it contained no provision for giving notice of the requirements of the sanitary authority to the person against whom it was contemplated that proceedings should be taken for breach of the by-law.

CASE stated by a metropolitan police magistrate.

A complaint had been preferred by one Jordan, a sanitary inspector, on behalf of the respondent council against the appellants for that the appellants, being the owners as defined by the by-laws of the London County Council made under s. 39, sub-s. 1, of the Public Health (London) Act, 1891, of a certain lodging-house as defined by the said by-laws, did not provide and maintain from March 3, 1903, to April 20, 1903, in connection with the said house, a water-closet, earth-closet, or privy for every twelve persons, contrary to the provisions of the by-laws and the said Act.

At the hearing it was proved that the appellants were agents for letting and collecting, and in fact collected, the rent of the house in question during the period mentioned in the complaint, and that during that period the house contained nine rooms and one water-closet only, and no earth-closet or privy. In July, 1902, the house was let out in tenements to members of more than one family, and the appellants collected the rents of the several tenements from the tenants. In September, 1902, the whole of the tenants were ejected by the appellants.

From September, 1902, to January, 1903, the house was unoccupied, and in the latter month the whole of the house was let to one tenant, named Gates, at the rent (which was a rack-rent) of 36*l.* per annum, payable 3*l.* per month in advance. On January 5, 1903, three rooms only in the house were occupied by six persons. On March 3, 1903, the whole of the rooms in the house were occupied, and continued to be occupied until April 20, 1903, by sixteen people, who constituted four separate families. The rooms in the house not required by Gates for his own occupation were let by him to lodgers, from whom he received rent on his own account.

On March 11, 1903, an intimation was left on the premises, and also at the office of the appellants, that the water-closet accommodation was not sufficient. On March 25 the medical officer of health wrote to the appellants drawing their attention to the matter, in answer to which the appellants wrote that they were not the landlords. On March 26 the appellants wrote to Gates, to whom the house had been let, recommending that he should get rid of some of his lodgers, so that the total should not exceed twelve.

On the part of the appellants it was objected:—

(*a*) That by-law 26 of the London County Council made under s. 39, sub-s. 1, of the Public Health (London) Act, 1891, so far as it required the landlord or owner of any lodging-house to provide and maintain in connection with such house water-closet accommodation in the proportion of one water-closet for every twelve persons, was ultra vires and illegal, and that the magistrate had therefore no jurisdiction to deal with the complaint.

(*b*) That before any offence could be committed against the by-law, if valid, a notice from the sanitary authority was necessary.

(*c*) That the by-law, if valid, did not apply to the appellants, as they were not the owners of the premises within the meaning of the by-laws.

The learned magistrate overruled the objections, and convicted the appellants. The question for the opinion of the Court was whether the decision was right in point of law.

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NOKES v. ISLINGTON CORPORATION (No. 1).

Woodfin (*W. S. M. Knight* with him), for the appellants. The conviction was wrong. First, the appellants are not the owners of the premises within the meaning of the statute. Gates was the landlord in receipt of the rack-rents from the tenants, and was the owner with whom the sanitary authority should have dealt; even assuming that the persons for whom the appellants collected rent from Gates were the owners, the appellants were merely their agents, and were not personally liable to proceedings under the Act or by-laws. Secondly, the by-law is bad and made without jurisdiction. The power given to the county council by s. 39, sub-s. 1, is to make by-laws with respect to water-closets; this is not a by-law with respect to water-closets, but a by-law with respect to lodging-houses. The power to make by-laws as to lodging-houses is contained in s. 94, in which the purposes for which they may be made are clearly set out; the present by-law is wholly outside the express power given by that section. Thirdly, if it is to be considered to be a by-law relating to water-closets, it is bad as being repugnant both to the statute and to the common law. Sect. 37, sub-s. 3, provides in the clearest terms for a notice to be served on the owner or occupier requiring him to provide the necessary water-closet accommodation, and it is only on non-compliance with the requirements of the notice that the owner or occupier becomes liable to a penalty under that sub-section. In any event the by-law is unreasonable in imposing a penalty upon the owner without providing for notice to be given him, under which he might set things right.

Courthope-Munroe, for the respondents, was only heard on the point that the by-law was bad because it did not provide for notice to the owner or occupier. The provision for notice before enforcement of a penalty only applies to proceedings under s. 37, and not to proceedings under s. 39, as these were. A by-law in these terms was originally framed on the coming into operation of s. 35 of the Sanitary Act, 1866, and was in force until the present by-law was made. There is no more necessity for giving notice before taking proceedings in the case of a by-law than in the case of the ordinary law. In the

present case notice was in fact given by the letters of March 11 and March 25.

Woodfin, in reply.

LORD ALVERSTONE C.J. In my opinion the objection to this by-law on the ground that it does not provide for notice to the person against whom proceedings are to be taken is a good objection. Reliance was placed by the appellants on the provision in s. 37, sub-s. 3, of the Act of 1891, which deals with a very analogous matter, the provision of sufficient water-closet accommodation, and provides for service on the owner or occupier of a notice calling upon him to provide the necessary accommodation; and this contention is one of considerable weight. There is in my opinion no doubt whatever as to the power of the county council to make by-laws specifying the minimum amount of sanitary accommodation to be provided for a given number of persons; but under s. 39, sub-s. 3, the duty is cast upon the sanitary authority of enforcing the by-laws made, as this by-law was made, under that section, and the by-laws contemplate the imposition of a penalty of 5*l.* for a breach of this by-law. The case illustrates the importance of such a by-law containing a provision for notice being given to the person against whom it is intended to take proceedings. The appellants collected the rent that was paid by Gates, and may be said to stand in the same position as the owners; but Gates was the person responsible for there being more than twelve persons in a house with only one water-closet; it is therefore a case in which the appellants had parted with the control over the persons in the house, and in which it was only reasonable that they should have notice of intended proceedings, as they would in that case naturally put pressure on Gates to reduce the number of persons in the house. I think therefore that this by-law, which contains no provision for notice to the person against whom proceedings are contemplated, is bad. Under s. 39 the sanitary authority has power to specify the amount of water-closet accommodation required, and under s. 37, sub-s. 3, they have power, and

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in fact are required, in the case of a house without such accommodation, to serve a statutory notice upon the owner or occupier requiring him to provide the necessary accommodation; and in default of compliance with the notice the owner or occupier is liable to a penalty. That sub-section clearly contemplates that a notice should be given before commencing proceedings for the infliction of a penalty. It is therefore a good objection to this by-law, which imposes a penalty for its breach, that it does not provide for the same kind of notice to the owner or occupier as that contemplated by s. 37, sub-s. 3, and this appeal must be allowed.

LAWRANCE J. and KENNEDY J. concurred.

Appeal allowed.

Solicitor for appellants: *A. D. Levi.*

Solicitor for respondents: *A. M. Bramall.*

W. J. B.

STILES *v.* GALINSKI.
NOKES AND ANOTHER *v.* CORPORATION OF ISLINGTON (No. 2).

1904
Feb. 3.

London—Public Health—Lodging-house—Validity of By-law—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *s.* 94, *sub-s.* 1 (*d*), (*e*).

In two metropolitan boroughs a by-law with respect to houses let in lodgings was made by the council of the borough under s. 94 of the Public Health (London) Act, 1891, requiring the landlord of a lodging-house (the definition of which included any house occupied by members of more than one family) to cause every part of the premises to be cleansed, and the ceilings and interior walls to be lime-washed, in the first week of April in every year. In one case "landlord" was defined as the person who received the rack-rent of the premises; and in the other case the definition included the person who received the profits arising from the letting of the house as a lodging-house:—

Held, that having regard to the wide definition of lodging-house and landlord the by-law was, in both cases, unreasonable and bad, because it contained no provision that a landlord, before becoming liable to a penalty for a breach of the by-law, should receive notice that the requirements of the by-law had not been complied with:

Held, also, by Lord Alverstone C.J. and Kennedy J., Wills J. dissenting, that in so far as the by-law required the work to be done in the first week of April, the by-law was not unreasonable.

STILES *v.* GALINSKI.

CASE stated by a metropolitan police magistrate.

An information was preferred by the appellant against the respondent for that the respondent, being the landlord of a lodging-house, No. 166, Stepney Green, did not in the first week of the month of April, 1903, cause every part of the premises to be cleansed, contrary to the by-laws in such case made and provided. On the hearing of the information the magistrate dismissed the information subject to this case.

The facts stated in the case were as follows: The appellant was a sanitary inspector and inspector of lodging-houses under the council of the borough of Stepney. The respondent was the landlord, within the meaning of the by-laws hereinafter referred to, of the lodging-house in question, which was in the borough of Stepney, and was registered under the by-laws.

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Evidence was given that on March 18, 1903, the appellant visited the house and found the rooms and staircases dirty. He again visited the house on April 14, and he found the same state of dirt; so that it was clear that no cleansing had been done during the first week in April.

In 1902 by-laws, with respect to houses let in lodgings, were made by the Stepney Borough Council under s. 94 of the Public Health (London) Act, 1891 (1), and the by-laws had been duly allowed by the Local Government Board.

By-law 1 provided that, unless the context otherwise required, the following words and expressions should have the meanings thereinafter respectively assigned to them (that is to say): "Lodging-house" means a house or part of a house which is let in lodgings or occupied by members of more than one family. "Landlord" in relation to a lodging-house means the person (whatever may be the nature or extent of his interest in the premises and whether he resides on the premises or not) who receives or is entitled to receive the rack-rent of a lodging-house. "Keeper" in relation to a lodging-house means the person (whatever may be the nature or extent of his interest in the premises) by whom or on whose behalf such house or part of a house is let in lodgings or for occupation by members of more than one family, or who for the time being receives or is entitled to receive the profits arising from such letting, whether on his own account, or as agent or trustee for any other person, or who would so receive the same if such house or part of a house were let at a rent.

By-law 14 was as follows: "The landlord of a lodging-

(1) Sect. 94 of the Public Health (London) Act, 1891, provides that—(1.) every sanitary authority shall make and enforce such by-laws as are requisite for the following matters (that is to say): (*d*) For enforcing drainage for such houses and for promoting cleanliness and ventilation in such houses; (*e*) for the cleansing and lime-washing at stated times of the premises. Sect. 114 provides that all by-laws made by any sanitary authority under this Act shall be made subject and according to the provisions with respect to by-laws contained in ss. 182 to 186 of the Public Health Act, 1875 (38 & 39 Vict. c. 55). Sect. 182 of the Public Health Act, 1875, provides that no by-law made under that Act by a local authority shall be of any effect if repugnant to the laws of England or to the provisions of that Act.

house shall in the first week in the month of April in every year, and at such other times as the condition thereof may render it necessary, cause every part of the premises to be cleansed. He shall at the same time" (except in certain specified cases) "cause every area, the interior surface of every ceiling and wall of every water-closet belonging to the premises and the interior surface of every ceiling and wall of every room, staircase, and passage in the house, to be thoroughly lime-washed." The by-laws applied equally whether the lodging-houses were registered or not.

The magistrate was of opinion that so much of the first clause of by-law 14 as required the annual cleansing by the landlord was invalid on the following grounds:—(*a*) Being ultra vires. (*b*) Being repugnant to the laws of England. (*c*) Being repugnant to the provisions of the Public Health (London) Act, 1891. (*d*) Being unreasonable.

The magistrate therefore dismissed the summons.

George Elliott, for the appellant. The decision of the magistrate was wrong. Although at common law there is no obligation upon a landlord, apart from covenant, to make premises demised by him either habitable or sanitary, s. 94 of the Public Health (London) Act, 1891, clearly contemplates that the by-laws to be made under that section will impose certain obligations upon landlords of lodging-houses. The very object of the section is to enable the local authority to make by-laws under which proceedings can be taken against the landlord. Under s. 4 of the Act of 1891 landlords are in a similar manner made liable in the case of nuisances, directly where the nuisance is caused by a structural defect, and indirectly in other cases. The by-law in question is therefore neither ultra vires nor repugnant to the provisions of the Act of 1891, nor is it repugnant to the laws of England. The by-law is not unreasonable having regard to the object of the Legislature and the class of property dealt with. It provides that the landlord "shall cause" the premises to be cleansed. That does not necessarily mean that the landlord is to be personally liable in the first instance, but that he must make

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arrangements with his tenants by which they will do the work, the landlord reserving to himself the right to enter and to do the work in the event of the tenant's failure to do it.

The magistrate was further of opinion that the words "at stated times" in s. 94, sub-s. 1 (*e*), meant "at stated intervals," and that the by-law was bad because it requires the work to be done in the first week in April. "At stated times" does not mean at stated intervals, and there is no reason why those words should receive any other than their ordinary meaning. It is not unreasonable that the work should have to be done in one particular week; for the purpose of inspection and supervision it is more convenient that that should be the case.

R. C. Glen, for the respondent. In determining whether this by-law is valid, regard must be had to the fact that a lodging-house as defined by these by-laws comprises any house let in lodgings or which is occupied by more than one family, and that the expression "landlord" includes the person receiving the rack-rent. There is no saving clause as to existing leases or as to premises not let in the first instance for user as lodging-houses, and the by-law would apply even to a case where premises were used as a lodging-house in contravention of the lease and without the knowledge of the landlord. In all cases liability for a breach of the by-law is imposed directly upon the landlord, and without any provision as to giving him notice that the cleansing of the house has not been carried out, although he may be absolutely ignorant of the fact, and even may be unaware that his house is occupied as a lodging-house, and, in the absence of covenants, may have no right to enter the premises and do the work. These considerations shew that this by-law is far too wide and most oppressive, but the absence of any provision as to notice is in itself quite sufficient to render the by-law invalid: *Nokes* v. *Corporation of Islington* (*No.* 1.) (1) It is no answer to these objections to say that the magistrates will not convict in cases of the kind referred to, or that the local authority may be trusted not to act unreasonably: *Kruse* v. *Johnson*. (2) The use of the word "cause" does not have the effect of preventing the primary

(1) Ante, p. 610. (2) [1898] 2 Q. B. 191.

liability from falling on the landlord. That word is used all through the Public Health Acts, and means that the person indicated is to do the work himself. Under those Acts, with the one exception of structural defects, the primary liability is always placed on the occupier, not on the landlord.

The only reasonable construction of "at stated times" is to read it as meaning at stated intervals. If it has the meaning contended for by the appellant this by-law obviously goes too far, because it also requires the work to be done whenever necessary, which is certainly not a stated time in the appellant's sense. It is also most unreasonable to require this work to be done in one particular week. There is a similar by-law in force in many other districts in the West End and other parts of London, and if the same week is adopted everywhere there must be considerable difficulty in obtaining an adequate supply of labour; but when the particular week selected happens to be one which in many years coincides with the Easter holidays, the difficulty is so greatly increased as to render compliance with the by-law a practical impossibility in many cases.

Elliott, in reply, referred to *Parker* v. *Inge* (1) and *Lancaster* v. *Barnes District Council*. (2)

NOKES AND ANOTHER *v.* CORPORATION OF ISLINGTON (No. 2).

CASE stated by a metropolitan police magistrate.

The appellants, who were the landlords, within the meaning of the by-laws of the Islington Corporation, of a lodging-house in that borough, were charged with a breach of a by-law as to cleansing lodging-houses within the first week in April, the terms of which were the same as those of by-law 14 in the previous case. The definition of "lodging-house" in these by-laws was the same as in the Stepney by-laws, and the definition of "landlord" was in the same terms as the definition of "keeper" in the Stepney by-laws. The by-laws did not apply to a lodging-house until, by a resolution of the sanitary authority, it had been placed upon a register of lodging-houses; and notice of the passing of the resolution together

(1) (1886) 17 Q. B. D. 584. (2) [1898] 1 Q. B. 855.

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with a copy of the by-laws were required to be served at the house in question.

The house in question contained ten rooms, and was not cleansed in the first week of April. Some of the rooms had been whitewashed and papered in December, 1902, and the rest of the cleansing was not carried out till May, 1903. It would take two men from a week to a fortnight to cleanse the house in accordance with the by-law. The cleansing required could to a large extent be done by unskilled labour, and evidence was given that an almost unlimited supply could be obtained during the first week in April. The magistrate came to the conclusion upon the evidence before him that, if it was necessary that the cleansing should be carried out in any one week, the first week in April was most suitable, having regard to the condition of the labour market and all other matters.

It was contended on behalf of the appellants that the by-law was unreasonable and ultra vires and therefore invalid, in that it was practically impossible that all the lodging-houses in the borough of Islington could be cleansed in the space of one week.

The magistrate was of opinion that although there might be some difficulty in complying with the by-law, yet as there was no impossibility in so doing, the by-law was not so unreasonable as to be invalid in law, and he so determined accordingly and convicted the appellants.

Clarke Williams, for the appellants. The by-law is repugnant both to the Public Health Act, 1875, and also to the Act of 1891; under both those Acts an owner of property always has to receive notice before proceedings can be taken against him. The by-law is unreasonable, because it contains an unqualified command to cleanse the premises in the first week of April, whether they in fact require cleansing or not. In the present case the evidence shewed that the premises did not in fact require to be cleansed in the first week of April, but the appellants are nevertheless liable to be convicted and fined.

Courthope-Munroe, for the respondents. The definition of "landlord" in this case confines the operation of the by-law to

the person actually in touch with the premises, and there is therefore no necessity for giving him notice before taking proceedings. The cases of hardship which it is said may occur under these by-laws ought not to affect the judgment of the Court; it is not the practice to put the by-laws in force, by registering lodging-houses thereunder, against any but the class of lodging-houses which are likely to need supervision. *Nokes* v. *Corporation of Islington* (*No.* 1) (1) is not an authority for the general proposition that a by-law must be invalid if it does not provide for notice to be given before proceedings are taken. [He also contended that upon the true construction of the by-laws taken as a whole the landlord would in fact receive notice of intended registration before a lodging-house could become subject to the by-laws.]

Clarke Williams replied.

LORD ALVERSTONE C.J. No one can doubt the great importance of the question raised by these cases, and I am glad that the Court has received the assistance of having both cases thoroughly argued. Having regard to certain observations which have been made in the course of the arguments, I wish to point out, holding as I do that the by-law in both cases is bad, that our decision will not in the least interfere, as suggested, with the discretion of local authorities as to making by-laws. On all practical matters, provided they come within the ambit of the powers of the local authority as to making by-laws, the discretion of the local authority ought not, in my opinion, to be lightly interfered with, and only when it is quite clear that the by-law in question is in conflict with some legal principle. I agree with that which Lord Russell of Killowen C.J. said in *Kruse* v. *Johnson* (2), that by-laws ought to be supported if possible, and that the Court ought to be slow to condemn as invalid any by-law on the ground of supposed unreasonableness. But, on the other hand, as we pointed out in the previous case of *Nokes* v. *Corporation of Islington* (*No.* 1) (1), if a by-law necessarily involves that which is unreasonable, it is our duty to declare it to be invalid; and when one comes to

(1) Ante, p. 610. (2) [1898] 2 Q. B. 91.

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consider the by-laws in question in the present cases and the purposes for which they were enacted, I can see no reason why they could not have been so framed as to avoid the difficulties which have been pointed out in the course of the arguments. I have come to the conclusion that in neither case can the by-law be supported. I will first deal with the Stepney case. The ground upon which I hold that the by-law is unreasonable and therefore invalid is that it includes, or may include, within its scope a class of persons who are neither legally nor morally responsible for the due observance of the by-laws, and makes those persons liable to penalties without proper safeguards as to notice. The by-law, No. 14, provides that the landlord shall in the first week of the month of April in every year cause every part of the premises to be cleansed. The use of the word "cause" partly creates the difficulty; if the word could be construed to mean "take reasonable steps," the same difficulty would not arise; but I think it means more than that—it means that the person upon whom the duty is cast must see that the work specified is done. That person is the landlord, and the landlord is defined by the by-laws to mean "the person (whatever may be the nature or extent of his interest in the premises and whether he resides on the premises or not) who receives or is entitled to receive the rack-rent of a lodging-house." I do not for the moment read the definition of "keeper," because I agree that the by-law would be less open to objection if it were confined to persons who really had what I may call the personal management of the house; and I think this view is confirmed by analogy by reference to the sections of the Public Health Act, 1891, dealing with nuisances which seem to draw a distinction between the person who actually causes the nuisance and the owner or occupier of the premises. I do not attach any importance to the argument that a landlord would have no right to enter the premises, and therefore would have no means of ascertaining whether or not the by-law had been complied with, because under the ordinary form of agreement of tenancy a right of entry would, or ought to, be reserved to the landlord. I wish further to say that I do not think a by-law would

necessarily be bad because it imposes a duty upon a landlord who may be a person having no connection with the premises beyond receiving the rent; but in my opinion where a by-law imposes a liability on a landlord in cases like the present, where there are persons who are or may be under a contractual obligation towards the landlord to carry out the requirements of the by-law, the landlord himself ought not to be made liable for a breach of the by-law without first having notice that the by-law has not been complied with. I have therefore come to the conclusion that this by-law is bad, because it does not provide that the landlord shall, before becoming liable to a penalty, receive notice that the by-law has not been fulfilled.

With regard to the Islington case, a point was raised by counsel for the respondents, which would, if it could have been made good, have differentiated the case from the Stepney case. It was said that in the Islington by-laws the definition of "landlord" is narrower and corresponds with the definition of "keeper" in the Stepney case. To a certain extent I agree that that is so, but I think nevertheless that even with the narrower definition of "landlord" the difficulties to which I have referred are not entirely got rid of. It seems to me that this by-law might, without an unreasonable construction, be read to apply to the case of a person who derives profit from the house without being actually in touch with the premises in the same way that the ordinary keeper of a lodging-house is, and I think, therefore, that this by-law must also be held to be bad, for the reasons already stated.

Another question is raised by these cases. It is said that the by-laws are bad, because the work of cleansing is required to be carried out during the first week in April. The Public Health (London) Act, 1891, s. 94, provides for the making of by-laws "for the cleansing and lime-washing at stated times of the premises." That does undoubtedly, in my opinion, authorize the local authority to fix a time within which or by which the work is to be done, and I think that the fixing of the time is a matter in which the knowledge and experience of the local authority ought to prevail, and the by-law ought not to be held invalid on this ground unless it is open to so grave

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an objection as to be unreasonable in law. Although I was impressed by the argument that the first week in April is, or may be in some years, an inconvenient time for doing the work of cleansing, still there may be other considerations, known to the local authority, arising from the circumstances of the particular locality which counterbalance the inconvenience; and, speaking for myself alone, I am not prepared to hold that these by-laws are unreasonable, and therefore invalid, on the ground that this particular week has been selected. I prefer to rest my decision on the other ground. It follows that the appeal in the first case will be dismissed, and in the second case allowed.

WILLS J. I entirely agree with, and adopt as part of my judgment, everything that my Lord has said, except with regard to the question about the work having to be done in the first week in April; but I should like to add a few observations of my own.

It seems to me that an initial mistake has been made in these by-laws, by trying to make the same hard and fast rule apply to two perfectly different classes of houses. A series of regulations, which may be suitable for a lodging-house proper, that is to say a house similar in character to a common lodging-house, would be quite inapplicable to the large class of houses which are brought within the operation of these by-laws by reason of the inclusion in the definition of lodging-house of "houses occupied by members of more than one family." In the West End of London, where, we are told, similar by-laws apply, there are a large number of houses so occupied as to bring them within that definition. For example, it is a common practice for doctors living in the district, in which the Portland estate is situated, to let off parts of their houses to other medical men for use either as consulting-rooms only, or as both consulting and living rooms. That causes those houses to become lodging-houses within this definition, and to apply these by-laws to houses of that class seems to me to be most unreasonable; and as the definition of landlord includes the person who receives the rack-rent, it follows that

there would be imposed upon the landlord of that estate the intolerable burden of being liable to a penalty under these by-laws in respect of all the houses so occupied, if they were not thoroughly cleansed and lime-washed in the first week in April. It may be said that that is an extreme case; but it is only by taking extreme cases, assuming that they are fairly within the scope of the by-laws, as this one is, that one is able to see whether the by-laws, taken as a whole and as applicable all round, are reasonable. If the by-laws were confined to houses occupied in the same kind of way as common lodging-houses are, there would be more to be said in their favour; but even in that case I agree with my Lord, that, unless the person who is made liable is a person who from his position and his relation to the property ought to know exactly the state in which the tenants are keeping the house, it would be unfair to make him liable without notice.

I desire to protest strongly against one argument put forward in support of the by-laws, namely, that although they might be considered harsh and unjust if applied all round, yet the local authority may be trusted only to put them in force in cases where it would be reasonable to do so. In the first place, the local authority are not the only persons who can set the law in motion; every subject of the Crown is entitled to do so; and, secondly, I dislike extremely legislation which is felt to be so unfair if universally applied that it can only be justified by saying that in particular cases it will not be enforced. I think that that is as bad a ground for defending legislation as one could well have.

With regard to the question about the first week in April, I feel fully the force of what my Lord has said, but I am unable to agree that this particular week must be taken to be a proper time for the work to be done merely because it has been fixed by the local authority, if it does lead in particular instances, which are not chimerical at all, to an almost preposterous state of the law. Take such a neighbourhood as that of Wimpole Street, Harley Street, &c., for an instance, I do not suppose that a single occupier of a good house in those localities, whether he comes under the operation of the by-law or not,

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WILLS J.

lime-washes his ceilings once a year or at all, or either lime-washes or whitewashes every room in his house once a year, or anything like it; nor is there the least occasion for his doing so. But if every one, who in those and similar localities has a "lodging-house," has to have his house lime-washed from top to bottom in the same week, I do not know where the necessary workmen could be found. In the Islington case it is stated that it would take two men working all day from ten days to a fortnight to do the necessary work. Having regard to the fact that Easter sometimes falls in the first week of April and to the difficulty of getting work done during the period of the Easter holidays, there would in some years be not more than two or three days really available for the work, and I do not think that a by-law which may have that operation can have received full consideration of its applicability to practical purposes. Therefore on both grounds I come to the conclusion that the by-law in the Stepney case cannot be upheld.

In the Islington case the definition of "landlord" is not so wide as in the other case, but even that modified definition of "landlord" is open to objection for reasons which my Lord has pointed out, and with which I entirely agree.

KENNEDY J. I have come to the same conclusion, but with great reluctance from one point of view, namely, that it is the health of the helpless which is very largely protected by these by-laws; and I cannot help thinking that a great many of the difficulties which have been suggested would not occur in practice if the persons concerned loyally did their best to try and carry out the intentions of the framers of the by-laws. I confess however that, for the reasons given by my Lord, I am unable to see how the by-law in question in either case can be supported. I think that this is an unfortunate result, because one knows that persons who do not want to face liabilities which they ought to incur by keeping property in an insanitary condition can always put difficulties in the way of enforcing by-laws by the employment of intermediate agents, who it is contended, are the only persons really in touch with the tenants; and I can understand that it may be difficult to frame a by-law

which shall on the one hand place responsibility upon the person who is really deriving the high rent obtainable from this class of property, and which shall on the other hand not produce the possible injustice of a person being made liable to penalties without any notice that the person immediately responsible for the management of the property has failed in his duty.

With regard to the point about the first week in April, with great respect to my brother Wills, I do not agree that the local authority have no power to fix a definite period of time within which the work must be done. I think that local bodies who are familiar with the local requirements, and who express the wishes of the community by representation, and who must be taken to know their business, ought not to be lightly interfered with in matters purely of management and routine such as this. The first week in April has been found by the magistrate in the second case not to be unreasonable, and I am not disposed myself to interfere with any period which the local authority, the appointed representative of the ratepayers, have chosen to fix upon.

In the second case also I think that it is impossible to accept as satisfactory in the sense of reasonableness the definition of "landlord," though I can understand the local authority may have thought it arguable that "landlord" in this by-law did mean the person immediately in touch with the tenant.

Appeal in first case dismissed.
Appeal in second case allowed.

Solicitors for appellant in first case: *C. V. Young & Co.*
Solicitor for respondent in first case: *G. Vandamm.*
Solicitors for appellants in second case: *Young & Cooper.*
Solicitor for respondents in second case: *A. M. Bramall.*

F. O. R.

C. A.
1904
Feb. 11.

[IN THE COURT OF APPEAL.]

SANDERSON *v.* COLLINS.

Master and Servant—Negligence of Servant—Bailment—Bailor and Bailee—Injury to Article bailed—Liability of Master.

The defendant sent his carriage to be repaired by the plaintiff, who was a coach-builder. The plaintiff lent a carriage of his own to the defendant for use while the repairs were going on. The coachman of the defendant, without his knowledge, took the plaintiff's carriage out for his own purposes, and while he was driving the carriage it was injured through his negligence. In an action to recover the cost of repairing it:—

Held, that as the coachman at the time when the injury was done to the carriage was not acting in the course of his employment, the defendant was not liable.

Coupé Co. v. *Maddick*, [1891] 2 Q. B. 413, considered.

APPEAL from the judgment of a Divisional Court on appeal from a decision of the judge of the Newcastle-on-Tyne County Court.

The action was brought to recover the cost of repairing a carriage. It appeared that the plaintiff was a coach-builder, to whom the defendant sent his carriage for repairs. The plaintiff lent a four-wheeled dog-cart to the defendant for his use while his own carriage was under repair, and the carriage so lent to the defendant was injured under the following circumstances. The defendant gave evidence that the key of his coach-house was kept in the drawer of a table in the hall of his house. The dog-cart was taken out from three in the afternoon of June 30, 1902, until five, and the last time that the defendant saw the key was at three o'clock on that afternoon. It appeared that later in the day the dog-cart was taken out by the defendant's coachman without authority; that the coachman and other men in the dog-cart were the worse for liquor, and that in turning a corner there was a collision with a tramcar, and the dog-cart was damaged. It was submitted for the defence that at the time of the accident the defendant's coachman was not acting in the course of his employment.

The county court judge gave judgment for the defendant, and the plaintiff appealed.

The Divisional Court (Lord Alverstone C.J., Wills J., and Channell J.) reversed the decision of the county court judge, and gave judgment for the plaintiff upon the authority of *Coupé Co.* v. *Maddick*. (1)

The defendant appealed.

Manisty, K.C., and *Meynell*, for the defendant. The act of the defendant's coachman which caused the injury to the carriage was not done within the scope of his employment, and the law is clear that if so the defendant is not liable: Sir William Jones on Bailments, 4th ed. p. 89, and note (43), and Story on Bailments, 9th ed. § 402. If the case of *Coupé Co.* v. *Maddick* (1), on the authority of which the Divisional Court gave judgment for the plaintiff, was decided on any other view of the law, it should be overruled; but it may, perhaps, be distinguished from this case, because the coachman had been entrusted with the carriage to drive to a certain place, and though he drove to another it may be argued that his driving was in the scope of his employment. In this case the judge has, in effect, found that the act of the coachman was tortious in that he committed a trespass in taking the carriage out to the coach-house without any authority from the defendant. It must be admitted that mere disobedience by a servant of the master's orders while doing an act in the course of the employment does not absolve the master from the consequence of the act of the servant: *Whatman* v. *Pearson* (2); but that is because the relationship of master and servant still subsists. It is otherwise where that relationship is for the time broken: *Mitchell* v. *Crassweller* (3); *Storey* v. *Ashton*. (4)

Robert Wallace, K.C., and *Mundahl*, for the plaintiff. This is not an action of tort, but of contract, and the obligation on the bailee was not merely to take reasonable care of the carriage, but to take the highest decree of care. The defendant was bailee of the carriage, and he entrusted the care of it to his

(1) [1891] 2 Q. B. 413.
(2) (1868) L. R. 3 C. P. 422.
(3) (1853) 13 C. B. 237.
(4) (1869) L. R. 4 Q. B. 476.

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coachman. His user of it was not a case of conversion, but only a breach of discipline in using the carriage as he did. There is no question of a tortious act by the coachman, but only a lack of care in relation to the custody of the carriage, and for that the defendant is liable. A bailee does not escape liability by delegating the care of the article bailed to another. The contract of bailment cannot be modified by any contract, possibly one of later date, between the bailee and his servant which limits the scope of the employment of the latter. If the defendant had gone away for a holiday and had entrusted the carriage to a friend, he would be liable if through want of reasonable care it were damaged; and the same principle applies where, as in this case, the coachman was made the custodian of the carriage. It is submitted that *Coupé Co.* v. *Maddick* (1) was rightly decided, and is applicable to the present case.

COLLINS M.R. This case no doubt raises a question of some interest, but the decision at which we ought to arrive is clear when we get back to the principles by which the law of bailments is governed.

The question arises on this state of facts: The defendant owned a carriage which he entrusted to the plaintiff, who was a carriage-builder, to repair, and the plaintiff sent another carriage to the defendant during such time as his own carriage should be under repair. The bailment was for mutual consideration, and was not gratuitous or voluntary, and the degree of the obligation on the bailee in such a case is well settled, that the bailee must use reasonable care, which has been described as ordinary care, in the custody of the article bailed. That proposition was not seriously contested on behalf of the plaintiff.

What happened was, as appears by the findings of the county court judge, that the defendant used the carriage between three and five o'clock on the day on which it was injured. The proper place for the key of the coach-house was said to be a drawer in the hall of the house, and the defendant said that the

(1) [1891] 2 Q. B. 413.

last time that he saw the key was at three o'clock—that is, as I gather, at the time it was taken out by the coachman for the afternoon drive. The carriage was used for two hours, and after that it became the duty of the coachman to put it back in the coach-house. After the carriage came back, and at some time later in the day, it was taken out by the coachman absolutely for his own purposes, and on a frolic of his own. He took some friends with him and drove about to see the illuminations. They all appear to have got drunk, and a collision with a tramcar occurred, and the carriage was injured. It was afterwards returned to the plaintiff in a damaged condition, and he has brought this action claiming the cost of putting the carriage into repair.

The county court judge decided that, at the time of the accident, the coachman was not acting within the scope of his master's employment, and thus disconnected the act of the servant from his service, so as to relieve the master from liability. That decision has been reversed by the Divisional Court on the authority of *Coupé Co.* v. *Maddick* (1), and one of the learned judges expressed his approval of that decision.

To begin with, as I have said, the obligation on the defendant as bailee was only to take reasonable care, and so far as the act of his servant was to be taken as the act of the defendant he would be bound by it; and if the servant in the course of his employment and acting within the scope of his authority did not use reasonable care in the custody of the carriage, the master would be responsible. On the other hand, it is clear law that such a bailee as the defendant was is not responsible for the acts of persons who are not his servants in respect of particular acts—that is, who are not acting within the scope of their employment in doing those acts. If a burglar broke into the coach-house and took away the carriage and caused damage to it and brought it back, no liability would attach to the bailee, because the act would not be his, and he would not be responsible for the acts of a person between whom and himself there was no connection. But while not responsible in such a case, yet if his servant whose duty it was to keep the

(1) [1891] 2 Q. B. 413.

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carriage safely had been negligent in leaving the coach-house open, and the carriage were taken away, the master would be liable, because of the negligence of a person for whom he is responsible. That, I think, illustrates the distinction between the two cases. Burglary is perhaps an extreme instance of something not done under any mandate from the master, but any other act outside the scope of the authority given by him would equally relieve the master. If the servant in doing any act breaks the connection of service between himself and his master, the act done under those circumstances is not that of the master. The county court judge has by his judgment acquitted the defendant of negligence in employing as coachman the man who caused the mischief, and that ground of action does not exist. It seems to me that a satisfactory answer to the question raised on this appeal only involves a careful analysis of the facts, and when that is done it appears that there is no legal liability on the defendant.

Coming to the judgment of the Divisional Court, from which this appeal is brought, it would appear to have been arrived at on the authority of *Coupé Co.* v. *Maddick*. (1) Without deciding whether that case can or cannot be supported, it is sufficient to say that I think that it is distinguishable. The fact that makes it distinguishable from the one before us may be slight, but at the same time it may make all the difference. In that case, as I understand it, the act done by the coachman was admittedly within the scope of his authority. He had received an order to drive the horse in a particular direction; he did drive the horse, but instead of doing so in the direction ordered he drove in another direction. Still he was entrusted with the carriage and horses for the purpose of driving them, and they were injured owing to his negligent driving. Whether or not that is a sound distinction in point of law, it is a distinction in point of fact; and I think it is one that goes to the root of the matter, because the ground of the decision appears to have been that the coachman was acting within the scope of his authority, so as to render his master liable. I cannot agree with the Divisional Court as to that case being an authority in

(1) [1891] 2 Q. B. 413.

the present one, and for the reasons that I have given I think the appeal must be allowed, and the judgment of the learned county court judge restored.

ROMER L.J. I am of the same opinion, and I agree with the judgment delivered by the Master of the Rolls. I only desire to add a few words on the facts of the case. It is admitted that when the arrangement was made between the plaintiff and the defendant no special contract was made with regard to the obligations to be undertaken by the defendant. What then are the obligations that must be implied? Certainly the insurance of the safe return of the carriage is not one of them. The case is one of an ordinary bailment for mutual benefit, and the defendant as bailee is under an obligation, now well settled in law, by which he was bound to take reasonable care of the chattel entrusted to him, but was not liable for loss or injury which might happen to it during the bailment unless caused by his negligence or that of his servants acting in the course of their employment. As to any negligence on his part, the judgment of the county court judge shews clearly that in his opinion there was none, and the servant who caused the accident was not at the time acting in the course of his employment. That being the state of the facts, the defendant is not liable. The Divisional Court decided in a contrary sense on the authority of *Coupé Co.* v. *Maddick* (1); but, in my opinion, that decision can only be supported upon the view that the servant was at the time of the accident acting in the course of his employment. If and so far as that case was decided on some broader ground of the liability of the defendant as bailee, I can only say, speaking for myself, that it would appear to me to have been wrongly decided.

MATHEW L.J. Under the contract of bailment in this case, if the defendant as bailee took reasonable care of the carriage he would incur no liability for what might happen to it. Suppose, for instance, that without any negligence on his part it had been destroyed by fire, he would clearly not have been

(1) [1891] 2 Q. B. 413.

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Mathew L.J.

responsible. No doubt when the contract was entered into something more was contemplated than the personal acts of the defendant, because the carriage was to be placed for certain purposes in the custody of the defendant's coachman. For his negligence while acting, in the scope of his employment, as servant to the defendant the latter would be liable. But he would not be liable without negligence on his part for the acts of third persons, and the acts of the coachman acting outside the scope of his employment come within the same principle. The judgment of the county court judge establishes that the accident arose from acts of the coachman for which the defendant was not responsible, and I agree that the appeal must be allowed.

Appeal allowed.

Solicitor for plaintiff: *E. A. Fuller, for Dickinson, Miller & Dickinson, Newcastle-upon-Tyne.*

Solicitors for defendant: *Cree & Son, for H. Burns, Newcastle-upon-Tyne.*

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1904
Jan. 28.

THE LONDON TRANSPORT COMPANY, LIMITED *v.* TRECHMANN BROTHERS.

Ship—Charterparty—Freight at Rate per Ton of Gross Weight Shipped—"Payable on right and true Delivery of Cargo"—Loss of Part of Cargo—Lump Sum Freight—Freight on Cargo delivered—Bill of Lading Freight collected by Shipowner—Difference between Freight collected and Freight due for Cargo delivered—Recovery of Balance by Charterer.

By a charterparty a cargo of sugar in bags was to be loaded at a named port, and the ship so loaded was to proceed to another named port and there deliver the cargo "agreeably to bills of lading on being paid freight in full of all port charges . . . . at the rate of 10*s.* 6*d.* per ton of 20 cwt. gross weight shipped payable on right and true delivery of the cargo." Charterers' liability was to cease "when cargo is shipped and bills of lading signed, provided all the conditions called for in this charter have been fulfilled, but vessel to have a lien on the cargo for freight, dead freight, and demurrage." Any difference between the charterparty and bills of lading freight was to be settled at the port of loading on clearance of the vessel if required by the master. The amount due under this clause was ascertained at the port of loading, and paid by the charterers to the shipowners. The vessel loaded a full cargo, but on the voyage she grounded and a portion of the cargo was lost. The remainder was delivered at the port of discharge, and the bills of lading freight on the whole cargo shipped was collected by the shipowners. In an action by the charterers to recover, as money received to their use, the difference between the freight so collected by the shipowners and the amount due to them under the charterparty in respect of the cargo delivered:—

Held, by Lord Alverstone C.J. and Collins M.R., Romer L.J. dissenting, affirming the judgment of Walton J., that under the charterparty the shipowners were not entitled to a lump sum freight, and that the balance of freight in their hands could be recovered from them by the charterers.

APPEAL from the judgment of Walton J. at the trial of the action without a jury.

The defendants were the owners of the steamship *Wilster*, of which the plaintiffs, through their agents, were charterers. The charterparty was partly in print and partly in writing as indicated below by italics, and portions of the print had been struck through as indicated below. The dead-weight cargo capacity was guaranteed as 3000 tons minimum and 3150 maximum. By the terms of the charterparty the steamer was

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to proceed to Fiume and there load a full and complete cargo of sugar in bags, and being so loaded proceed to Boston "and there deliver the cargo agreeably to bills of lading on being paid freight in full of all port charges, wharfages, consulage, pilotages and other charges customarily paid by steamers ~~for the full reaches and burden of the steamer's hold and every available space, the lump sum of or~~ at the rate of *Ten shillings and Sixpence* (10*s.* 6*d.*) per ton of 20 cwt. gross weight ~~delivered~~ *shipped in cash* payable on right and true delivery of the cargo ^ at the current rate of exchange for 60 days' sight bills on London. ~~In the event of steamer not carrying the guaranteed dead weight as above or owners failing to prove to the satisfaction of the charterers that the steamer can carry same, owners to be responsible for the consequences thereof and the above-mentioned lump sum to be reduced in proportion.~~" Another clause of the charterparty was as follows: "Charterers' liability to cease when cargo is shipped and bills of lading signed, provided all the conditions called for in this charter have been fulfilled, but vessel to have a lien on the cargo for freight, dead freight, and demurrage"; and another clause was as follows: "The master or person appointed by him shall sign bills of lading at any rate of freight as presented without prejudice or reference to this charter; and if required he is to give charterers' agents in Fiume written authority to sign them for him in accordance with mate's receipts; and any difference between this charterparty and bills of lading freight shall be settled at Fiume on clearance of vessel if required by master; if in charterers' favour, by captain's draft payable three days after arrival at port of discharge; if in steamer's favour, in cash, less 3 per cent. for all charges." The vessel proceeded to Fiume and loaded there a a full cargo of sugar in bags, and the difference between the charterparty and the bills of lading freight was ascertained there to be in favour of the shipowners, and the amount was paid to them by the charterers. The steamer proceeded on her voyage, but in the course of it she grounded and a part of the cargo was lost. The vessel was got off the ground, and

the remainder of the cargo, including a number of empty bags, was delivered at Boston, the port of discharge. The defendants collected from the consignees the full freight payable under the bills of lading. This action was brought by the plaintiffs to recover, as money received to their use, the difference between the freight so collected by the defendants and the amount due to them under the charterparty in respect of the cargo delivered.

The learned judge held that the meaning of the charterparty was that freight was to be paid at shipping weight on the cargo delivered, and that the weight per bag could be ascertained from the bills of lading and was to be taken as the shipping weight. He came to the conclusion that under the charterparty a lump sum freight was not payable, and that this view was confirmed by the fact that of the alternatives of paying freight in a lump sum or at a rate per ton on the weight shipped payable on delivery of the cargo the former had been struck out of the charterparty. He held that under these circumstances the balance of freight in the hands of the defendants over and above the amount of chartered freight due to them in respect of cargo delivered was freight to which the plaintiffs were entitled under the bills of lading, and that it had been collected for them and could be recovered by action. He was further of opinion that freight was not payable on the empty bags delivered as it was to be payable on delivery of sugar in bags, although on such a delivery the weight of the bags would necessarily be included. He therefore gave judgment for the plaintiffs.

The defendants appealed.

Carver, K.C., and *Leck*, for the defendants. Under this charterparty freight was to be calculated at the port of loading. The size and weight of the bags put on board is nowhere indicated as a means of arriving at the amount of freight, which is made to depend on the weight shipped. By that means, as soon as the cargo was put on board the amount of freight was fixed. The only reason why it was not expressed to be a lump freight was that it was not known at the time exactly how much the ship could carry within the maximum

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and minimum limits set out in the charterparty. No doubt the payment of freight depended on the arrival of the ship, and possibly she must have had some part of the cargo on board, but if these considerations were fulfilled the right to the whole freight was absolute. The only effect of the clause as to right and true delivery and the rate of exchange was to determine the time and mode of payment. In *Merchant Shipping Co.* v. *Armitage* (1) the contract was expressed to be for a lump sum, but in the present case the equivalent of a lump sum freight is arrived at on the terms of the charterparty. In that case, in which *The Norway* (2) and *Robinson* v. *Knights* (3) were reviewed and followed, the effect of the clause as to "entire discharge and right delivery of the cargo" was considered in reference to a lump sum freight, and the conclusion was that it was not a condition precedent to the recovery of that freight that the whole of the cargo should be delivered. Looking at the printed charterparty, it appears that the clause as to payment "on right and true delivery" was applicable to the case of a lump sum contract, in which under the decisions the amount of the freight is independent of the cargo delivered. The striking out of the clause as to a lump sum leaves the clause as to delivery applicable to the alternative of freight at a given rate on the weight shipped, and the effect is still to indicate the time and mode of payment. The terms of the charterparty shew that the parties contemplated a freight which would be known at the port of discharge, and would not be subject to diminution by reason of vicissitudes on the voyage. It should be noted that the word "delivered" in the print is altered into "shipped"; but the argument for the plaintiffs and the judgment of the learned judge take no note of this alteration, but treat the case as if the word were still "delivered." In any event it is submitted that the learned judge was wrong in not allowing the defendants to retain anything for freight of the large number of bags that were said to have been delivered without sugar in them.

(1) (1873) L. R. 9 Q. B. 99. 404; (1865) 3 Moo. P. C. (N.S.) 245.
(2) (1864) Brown. & Lush. 226,
(3) (1873) L. R. 8 C. P. 465.

[They cited also *Blanchet* v. *Powell's Llantivit Collieries Co.* (1) and *Hansen* v. *Harrold Brothers.* (2)]

J. A. Hamilton, K.C., and *A. M. Talbot*, for the plaintiffs. The authorities cited all arose on charters providing for a lump sum freight. In this case everything relating to such a freight has been struck out. Freight is primâ facie a sum paid for the carriage of goods, and is not earned till they are delivered: per Willes J. in *Dakin* v. *Oxley.* (3) The words "freight at the rate of 10*s.* 6*d.* per ton," therefore, import the condition that the shipowner must carry and be prepared to deliver the cargo, and from that point of view the words "payable on right and true delivery of the cargo in cash, &c." may refer to the time and mode of payment. A lump sum freight has to be paid in full if the vessel arrives with some cargo on board, and there is no relation between the lump sum freight and the cargo delivered. That is a state of things different from the ordinary case of payment for the carriage and delivery of goods. The fixing of freight at a rate per ton of gross weight shipped is enough to support the claim of the plaintiffs, but the clause as to payment on right delivery removes all doubt as to the right to freight at the destination of the goods and on the quantity delivered. The argument for the defendants loses sight of the antithesis between a lump sum freight and a freight payable at a given rate. *Spaight* v. *Farnworth* (4) is an example of freight ascertained by the quantity delivered at the port of discharge, but according to measurement figures that had been ascertained at the port of loading. That is in effect what has been done in this case by the judgment of the learned judge. As to the claim for freight on empty bags, delivered with the rest of the cargo, the delivery of bags without sugar does not satisfy the condition for the delivery of sugar in bags.

Carver, K.C., in reply.

LORD ALVERSTONE C.J. After the interesting and able arguments we have heard I have come to the conclusion that the judgment of my brother Walton is right.

(1) (1874) L. R. 9 Ex. 74.
(2) [1894] 1 Q. B. 612.
(3) (1864) 15 C. B. (N.S.) 646, at p. 664; 33 L. J. (C.P.) 115.
(4) (1880) 5 Q. B. D. 115.

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Lord Alverstone C.J.

It seems to me that the real question in this case is whether the contract between the parties can be treated as a lump sum contract—that is to say, a contract for the use of the ship. The contract is that the charterers are to load a full and complete cargo of sugar in bags which the charterers bind themselves to ship, and the ship being so loaded shall proceed to Boston and there "deliver the cargo agreeable to bills of lading on being paid freight in full of all port charges." So far it is a contract which contemplates the payment of the freight on delivery of the cargo. The clause continues: "at the rate of 10*s.* 6*d.* per ton of 20 cwts. gross weight shipped, payable on right and true delivery of the cargo in cash at the current rate of exchange for 60 days' sight bills on London." I pause there for the purpose of pointing out that the words "on being paid freight in full of all port charges," "at the rate of," "deliver the cargo on being paid freight," and the words "payable on right and true delivery of the cargo in cash," all indicate an ordinary contract for payment of freight upon delivery of the cargo. The difficulty arises because after the words "at the rate of" there follow "10*s.* 6*d.* per ton of 20 cwts. gross weight shipped." The question we have to consider is this—Does the fact that the rate of freight is to be fixed solely with reference to the gross weight of the cargo shipped justify the argument of the defendants that it is a contract for a lump sum freight? It seems to me that there is another class of contract from which we must distinguish it, having regard to the principle we have to apply, before we can say that this contract must be a lump sum contract, and that class of contract is one of which *Spaight* v. *Farnworth* (1) is an instance, where the freight is to be freight payable on right and true delivery, but at a rate to be fixed according to the weight of the cargo shipped. That was a timber case, and a contract to pay freight on delivery at the rate of the weight or quantity ascertained at the port of shipment, and it seems to me quite possible that in a sugar case, as this is, there may be a contract to pay freight on delivery on the weight of cargo as shipped. The real difficulty is to determine within which class of contract

(1) 5 Q. B. D. 115.

this contract falls—does it fall within the class of contract which is subject to the conditions which attach to a lump sum contract, or does it fall within that class of contract where the freight is payable upon delivery, but at a rate to be paid on the weight shipped? The only two other clauses that have any bearing are these ordinary clauses: "Charterers' liability to cease when cargo is shipped and bills of lading signed, provided all the conditions called for in this charter have been fulfilled, but vessel to have a lien on the cargo for freight, dead freight, and demurrage"; and: "Any difference between this charterparty and bills of lading freight shall be settled at Fiume," that is the point of loading, "on clearance of vessel if required by master; if in charterers' favour, by captain's draft payable three days after arrival at port of discharge; if in steamer's favour, in cash, less 3 per cent. for all charges." At first I thought there was a strong argument in favour of the defendants, because the clause seemed to contemplate the ascertainment of the actual payment due from the one party to the other in respect of the cargo of the ship at the time that the vessel was loaded, but I now think that I attached too much importance to that clause. That clause might apply to either class of contract, because it is merely for the purpose of adjusting the rights of the parties at the time, where there is a difference between the bill of lading freight and the chaterparty freight, in favour of the one side or the other, which has to be adjusted, and the only matter to be dealt with is the balance between the two parties; the rest will remain at the same risk as it was before; in other words, the shipowner, though he has received the extra 6*d.*, will still have to insure, and may be liable to lose his freight if he does not fulfil the conditions of the contract; and on the other side it is a clause which may be made use of in favour of the charterer. I therefore come to the conclusion, in accordance with the view of the learned judge, that it is open on this contract to say that it is a contract whereby the cargo is to be delivered on being paid freight; or, in other words, the time of payment of freight is to be when the cargo is delivered, and it is to be paid on right and true delivery of the cargo against

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freight calculated on the weight of sugar put on board. I am fully alive to the difficulties in actually ascertaining what is to be paid when a cargo arrives short in quantity; but I cannot help thinking that these were the very difficulties which were pointed out by Bowen J. in *Spaight* v. *Farnworth* (1); and in my opinion those difficulties are not sufficient to justify us in treating this case as within the category of contracts which are for lump sums. I do not refer again to the provisions beyond saying that they are the ordinary provisions for payment on the chartering of a ship—freight to be payable upon delivery—except the one condition that it is at the rate of 10*s.* 6*d.* per ton upon the gross weight shipped. Ever since *Dakin* v. *Oxley* (2) it has been recognised that Willes J. laid down the law absolutely correctly when he said that "The true test of the right to freight is the question whether the service in respect of which the freight was contracted to be paid has been substantially performed; and according to the law of England, as a rule, freight is earned by the carriage and arrival of the goods ready to be delivered to the merchant, though they be in a damaged state when they arrive. If the shipowner fails to carry the goods for the merchant to the destined port the freight is not earned. If he carry part, but not the whole, no freight is payable in respect of the part not carried, and freight is payable in respect of the part carried unless the charterparty make the carriage of the whole a condition precedent to the earning of any freight." Under what circumstances is that departed from? I believe it is accurate to state, as has been stated in the course of the arguments by both of the learned counsel, that, as far as authority goes, that rule has never been departed from, except in the case of lump sum freight, or, in other words, freight paid for the use of the ship. In the *Merchant Shipping Co.* v. *Armitage* (3) there were the words: "A lump sum freight of 5000*l.* to be paid after entire discharge and right delivery of the cargo," and it was held that the provision as to the right delivery of the whole cargo could not prevent the shipowner being entitled to receive that lump sum. That was following

(1) 5 Q. B. D. 115. (2) 15 C. B. (N.S.) 646; 33 L. J. (C.P.) 115.
(3) L. R. 9 Q. B. 99.

the cases of *The Norway* (1) and *Robinson* v. *Knights* (2), and therefore if, as I have said, the only reasonable construction to be put on this charterparty is that it is to be a charterparty for a lump sum, which lump sum is to be ascertained by paying 10*s.* 6*d.* per ton upon every ton shipped—if that is the true construction of this charterparty, of course the principle of those cases would apply. But I think it requires special words to deprive the word "freight" of the meaning which has been attached to it by the law of England for so many years, and I think that the mere fact that there would be difficulties in ascertaining what is due, because when the cargo arrives it has to be measured by the weight at shipment, is not sufficient. I fully recognise the difficulties that may arise in working out the contract, but those are difficulties in application, and must not be allowed to prevent us from applying recognised rules of law. I have come to the conclusion that this contract is in its terms an ordinary contract for payment of freight at a rate to be ascertained in a particular way, and is not a contract which has the incidents of a lump sum contract.

The other point, in my opinion, does not arise, because I think the charterers were, on the construction I put upon the charterparty, only liable to pay to the shipowners the rate of freight which Walton J. has assessed, and to the extent to which they received money beyond that which was due to them from the charterers, they received it by virtue of their position under the charterparty and as agents for the charterers. I therefore think that this appeal must be dismissed.

COLLINS M.R. I am of the same opinion, and I have very little to add, because I not only agree with the judgment delivered by the Lord Chief Justice, but also with that of Walton J. It seems to me that the basis of the whole question here is, What is the right of the shipowners to freight? It is perfectly clear law that primâ facie freight is not payable except upon delivery of the cargo, and there must be special provisions sufficiently clearly expressed in the contract between the parties to oust that presumption. Now what do I find on the face of

(1) Brown. & Lush. 226, 404; 3 Moo. P. C. (N.S.) 245. (2) L. R. 8 C. P. 465.

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Collins M.R.

this charterparty? To begin with, it is not a contract written out de novo between the parties, but a contract based upon a printed form, some parts of which are allowed to stand, and some parts of which are excluded, and on the face of this printed form there is a provision distinctly pointing to what is called a lump sum freight, and there is also a provision for the ordinary agreement as to freight, to the earning of which delivery is a condition precedent. In the charterparty as altered from the printed form I find a contract to take a full and complete cargo and deliver it at a certain place agreeable to the bills of lading, on being paid freight in full, and then, "At the rate of 10*s.* 6*d.* per ton of 20 cwt. gross weight shipped, payable on right and true delivery of the cargo in cash at the current rate of exchange for 60 days' sight bills on London." Is there anything in those terms incompatible with the primâ facie essential obligation to deliver the cargo before the freight is earned? The only thing that can be suggested as incompatible with it is that the rate at which the freight is to be paid is a rate per ton of the gross weight shipped. In that, as it seems to me, there is nothing inconsistent with the obligation to deliver the cargo in order to earn freight. It is a convenient way of measuring that which is to be paid—the freight—and it is convenient in this way, that for many causes the weight may be altered during the course of transit without any fault on the part of the shipowners, and therefore it is thought a fair provision that they should have a perfectly indisputable weight, the weight when the cargo is shipped, as the basis on which the charterers are to pay freight; and if it should happen that the weight is diminished by causes outside their responsibility, they are not to suffer in that respect. That is a very intelligible provision, and one which the parties might perfectly well have in mind when they made the stipulation, without any intention whatever to qualify the always underlying obligation to deliver cargo before freight is earned. The difficulty in practically applying the standard would not warrant us in substituting a different contract for that which the parties have made. That being what I should myself treat as the primâ facie inference from the word "freight," it is con-

siderably strengthened in the particular circumstances of this case; because I find, in the printed form upon which these persons are working, a provision which would have carried out that which is the now contention of the shipowners, namely, a contract for a lump freight. I find these words, "for the full reaches and burden of the steamer's hold, and every available space, the lump sum of" so much. All that is scratched out, and what is left in is the alternative form, which indicates freight in the ordinary way. So it was not a mere case, as I have said already, of a contract written out on a blank sheet of paper; but it was a deliberate deletion of that part of the printed contract which would have formed the obligation which the shipowners now set up. The Lord Chief Justice has gone through the rest of the charterparty, and referred to the leading authorities on the matter, and I do not think it is necessary to repeat anything that he has said. I agree in all he has said as to the right of the charterers to recover back from the shipowners the surplus which they have received, over and above the freight to which alone they have any right, namely, the freight payable on the cargo actually delivered. I agree, therefore, with the learned judge, and I think that this appeal fails.

ROMER L.J. I am sorry that I feel obliged to arrive at an opinion which differs from that of my Lords and Walton J. Inasmuch as the question involved in this appeal is one concerning charterparties, I need scarcely say that I differ with the greatest diffidence. At the same time, I have formed that opinion, and my duty, sitting here, is to express it.

I have come to the conclusion, stating the matter somewhat briefly, that the case before us cannot be distinguished in principle from that which was decided in *Merchant Shipping Co.* v. *Armitage*. (1) To my mind, when this charterparty is looked at, it will be found in effect that the cargo which is the subject of it is treated as one cargo, not as something broken up into portions, and that the amount that is to be payable for freight is in effect a lump sum though it is not called so. The cargo

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which is to be put in the ship is a full and complete cargo; and the tonnage of the ship and its carrying capacity are stated. That cargo, of course, might vary by a few tons either way, according to the minimum or maximum capacity of the ship, but it was to be a full and complete cargo; and freight was to be estimated with regard to that cargo at so much per ton. That appears to me to have been a short way of arriving at the amount of the freight directly the cargo was shipped and the ship was ready to depart. The method of ascertaining the sum that had to be paid for freight was, of course, fixed by reference to tonnage, because, as I have pointed out, the exact amount of the tonnage contained in the full and complete cargo could not be ascertained until the whole cargo was on board. When I come to that part of the charterparty which states when the freight is payable, I find the question of payment is dealt with by reference to the cargo as a whole. It is payable in cash on the right and true delivery of the cargo. Then it is stated that in substance this is to be treated as a provision for payment of the freight according to the tonnage of the cargo, or according to the bags in which that cargo was packed at the moment of delivery, so that the freight payable can only be ascertained by seeing what tonnage is delivered or how many bags are handed over. Let me first consider the question of tonnage. Is it a proper inference from this charterparty that it was contemplated that the freight would be payable according to the tonnage of the goods as delivered? On the face of the charterparty the sugar was to be shipped in bags. Those bags might be of any size and of any weight. I find, nevertheless, that the freight is to be ascertained with reference to the gross weight of the cargo shipped, which would include the weight of the bags. It would not be possible to ascertain with regard to this cargo, except by weighing it as a whole, what portion of it would be delivered on arrival of the ship, if any portion of it was lost. If the freight was payable according to tonnage on delivery (which is one of the views put forward by the respondents on this appeal) let me see what would have to be done. Could it be contemplated that there would have to be a reweighing of the cargo on delivery? How

could it be properly reweighed if the whole cargo did not arrive, and when that which arrived had been delivered in bags as I have indicated? It could not possibly be done, and I do not think it could have been contemplated that the weight on arrival was to be the matter on which the payment of freight depended. When you bear in mind that sugar must of necessity change in weight, it seems to me almost inconceivable that it could have been supposed that the amount of freight payable on this charterparty was to be considered with reference to weight on arrival, especially, as I have said, when it is further borne in mind that it would be impossible to tell, if the whole of the cargo did not arrive, how much had been wasted, or to ascertain what was the tonnage of the cargo that arrived when it was shipped. Of course, if I had come to a conclusion in other respects as to the true meaning of this charterparty, and thought that it did not come within the principle laid down in the *Merchant Shipping Co.* v. *Armitage* (1), I should not be deterred by difficulties of that sort from trying to do what was right between the parties, but I point out the difficulties as shewing that it could not have been contemplated in this case, as it appears to me, that there should have been any sort of reassessment of this cargo with reference to tonnage in order to ascertain the freight which is payable. Then I come to the next suggestion, which I really think was the main suggestion of the respondents on this appeal, namely, that the charterparty has to be construed as if it were a provision for payment of freight according to delivery of the bags in which the sugar was. I have already pointed out that there is nothing in this charterparty which says anything about the size or weight of the bags, but, except in saying that the cargo is to come in bags, there is nothing in this charterparty to shew that the bags had anything whatever to do with the freight, and if it had been contemplated that the payment of the freight would have depended on the number of bags that arrived more or less filled with sugar, nothing could have been more easy than to have said so in this charterparty. If the freight was to depend upon the number of bags which were delivered, it appears to

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me difficult to see why the charterparty referred at all to the gross weight of the cargo as it was shipped as it does in dealing with the question of freight. It appears to me, therefore, that to hold that this charterparty means that the freight is payable only on the cargo in bags as per bag when delivered is to do violence to this charterparty, and to put a construction upon it which it will not bear. Then I may point, as supporting the view that I am taking, to one of the later clauses in this charterparty. I refer to the clause about what is to happen when the master signs the bills of lading, and the rate of freight in the bills of lading differs from that in the charterparty. That provision, to my mind, points to this—that it is contemplated that the freight which is payable under this charterparty is a sum then ascertainable and which can be finally adjusted, if there is a difference between the bill of lading and the charterparty, by a sum in cash then ascertainable. It appears to me, therefore, looking at this charterparty as a whole, that it comes, in substance, to a charterparty for a cargo as a whole, not split up into items which can be separately identified. It is, therefore, as I have said, within the principle of the case I have referred to. I will only say with reference to *Spaight* v. *Farnworth* (1) that that case is really no authority in the present one, nor has it, to my mind, any material bearing upon it. There was no question in that case as to the construction of a charterparty. It was admitted that the freight was payable according to the timber as delivered, and the only question was as to a provision for the measurement of the timber, with reference to the kind of measurement adopted at the port of shipment. If that case is looked at it is only an authority for a principle, which I at once admit. Given that the respondents in this case were right in their construction of the charterparty, I should not hesitate to carry out that construction merely because it occasioned difficulties, but I think, apart from all other considerations, the construction contended for by the respondents in this case leads to almost incredible results—at any rate, to me, incredible. It would really appear from their contention, if they are right

(1) 5 Q. B. D. 115.

as to the bags, that, in a case of jettison, if portions of the sugar out of the bags had been jettisoned—say three parts of the sugar out of every bag—the charterers would be able to say that the whole freight was payable, but that if the whole of the sugar out of a certain number of bags had been jettisoned, they would be entitled to say that the freight was only payable in respect of the remaining bags which contained the sugar. That does not seem to be a result that would be desirable, nor does it appear to me to be a result which ought to follow from the charterparty. I have felt bound to express my opinion, though I do so, as I have said, with very considerable diffidence.

LORD ALVERSTONE C.J. There is one other point that I ought to have noticed which arises on the judgment of Walton J., namely, the contention that freight ought to be paid on a number of bags delivered empty, because even though they were delivered empty they must be taken as weighing the shipping weight. On the view that the Master of the Rolls and I take of this agreement, confirming that of Walton J., the learned judge had to find how much sugar in bags was delivered at the weight at which that sugar in bags was shipped; and he has gone through some calculation and arrived at that sum. It is said that ought to be increased, because in addition to what he has found for that, 7716 empty bags were also delivered. We think that was not sugar in bags, and, therefore, on the principle on which we have decided this case, whether we are right or wrong, the learned judge was right in excluding the empty bags.

Appeal dismissed.

Solicitors for plaintiffs: *Woodhouse & Davidson.*
Solicitors for defendants: *William A. Crump & Son.*

A. M.

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Feb. 6.

RUBEN AND ANOTHER *v.* GREAT FINGALL CONSOLIDATED AND OTHERS.

Company—Share Certificate issued by Secretary—Forgery—Principal and Agent—Scope of Employment.

The plaintiffs advanced in good faith a sum of money, which they had borrowed from their bankers, to the secretary of the defendant company for his own purposes on the security of a share certificate issued to them by the secretary, which, in accordance with the articles of association of the company, purported to be signed by two directors, to bear the company's seal, and to be countersigned by the secretary. As a matter of fact the signatures of the directors were forgeries, and the seal had been fraudulently affixed by the secretary to the certificate without any authority from the defendant company. In an action claiming that the defendant company should register the names of the plaintiffs' bankers in their books as owners of the shares :—

Held, on the authority of *Shaw* v. *Port Philip Gold Mining Co.*, (1884) 13 Q. B. D. 103, that the company were estopped by the certificate issued by their secretary from disputing the right of the plaintiffs to have the names of their bankers registered as the owners of the shares.

FURTHER CONSIDERATION before Kennedy J.

The following statement of facts is taken from the written judgment of his Lordship :—

One A. S. Rowe, then a partner in Bewick, Moreing & Co., was in December, 1902, the secretary of the defendant company. He held the appointment under a written agreement of December 31, 1900, between the defendant company and Bewick, Moreing & Co., whereby Bewick, Moreing & Co. undertook to provide the defendant company with suitable offices and office accommodation, a suitable secretary, to be approved of by the company, and a sufficient clerical staff. The secretary was to be paid by Bewick, Moreing & Co., but was to be deemed to be the secretary and officer of the defendant company, and subject to dismissal by the defendant company at any time. Bewick, Moreing & Co. were to receive 500*l.* a year from the defendant company, and also all transfer fees received by the defendant company. The defendant company's registered office in December, 1902, was in the offices of Bewick,

Moreing & Co., 20, Copthall Avenue, E.C., and several other limited companies were housed and provided for by Bewick, Moreing & Co. there under similar arrangements. The plaintiffs are a firm of stockbrokers in the City, with whom Rowe had for some months before December, 1902, done business on his own private account in stocks and share transactions. They knew he was a partner in Bewick, Moreing & Co. They did not know that he was secretary of the defendant company. They believed him to be a director of it. He had been introduced to the plaintiffs as a person in good credit, he kept his engagements, and they had every confidence in him. With Mr. Lindo, one of the partners in the plaintiffs' firm, Rowe was on terms of social acquaintance. In December Rowe saw Mr. Lindo, and asked whether the plaintiffs could arrange a loan for him on 5000 shares in the defendant company. He said he had a joint account with a friend, who wished to sell, and he desired to take over the friend's interest, and so avoid a sale, because, on information which he had received, he believed the shares (which were then at a premium) would rise considerably in value. He wanted the loan for a short time only, and as the 5000 shares afforded at the price of the day ample security for the 20,000*l.* which he wanted on loan, and he undertook, if there was any fall in price, to provide a 2*l.* per share margin, the plaintiffs agreed to try to meet his wishes. On December 16 the plaintiffs arranged with Lazard Brothers & Co., bankers in the City, who have been made by the plaintiffs defendants in this action in order that all the parties might be before the Court, for the advance of 20,000*l.* to themselves for a principal on the proposed security, and Mr. Lindo on the same day went to the offices of Bewick, Moreing & Co., which were also, as I have said, the offices of the defendant company, and told Rowe that the money would be ready on December 18. Rowe said that he would have the share transfer executed by the transferor on the following day. The shares, he said, were standing in the company's books in his friend's name, and not in his own. On December 17 the transfer, with the names of the transferees, Rosenhain (a partner in the bank) and Alexandre, who appears as a formal defendant in this action, upon

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it, was taken by Lindo to Rowe, and later in the same day it was returned by Rowe to Lindo, and purported to have been executed by "E. Storey" as transferor. A shareholder of that name was called before me as a witness and deposed that he was interested at the time in 5000 shares in the company, but that he was the registered owner only of 2000. In the corner of the document was the usual "certification." Rowe, when he gave Lindo the transfer, said that his directors (that is the directors of the defendant company) would be meeting the next day at 11 A.M., that he would explain everything to them, and have the share certificate made out in the names of Rosenhain and Alexandre, and that it would be ready for Lindo if he called at 11.30 A.M. The same afternoon Lindo brought back to Rowe the transfer executed by the transferees, paid to him the registration fee of 2*s.* 6*d.*, and received a receipt in due form. On December 18, at 11.30 A.M., at the office, Rowe delivered to Lindo the share certificate, and Lindo returned the receipt to Rowe. The certificate thus issued was in form perfectly regular. It purported, in accordance with art. 12 of the articles of association of the defendant company, to bear the seal of the defendant company, to be signed by two of its directors, and to be countersigned by Rowe as the defendant company's secretary. (1) Lindo learnt from it for the first time that Rowe was the company's secretary. The certificate was taken by Lindo to the plaintiffs' office, where it was examined by his clerk, and it was then taken by him to the office of Lazard Brothers & Co., where it was left after its examination by a clerk there, and their cheque for 20,000*l.* in favour of the plaintiffs was handed to Lindo. This cheque was paid by the plaintiffs into their own banking account, and a cheque of the plaintiffs for the same amount, less stamp fee and commission, was handed over to Rowe the same day, and was subsequently cashed by him. Within ten days Rowe absconded, and it was discovered that the certificate was a forgery. The

(1) No. 12 of the articles of association of the company was as follows: "The certificates of title to shares shall be issued under the seal of the company, and signed by two directors, and countersigned by the secretary or some other person appointed by the directors."

only genuine part of it was Rowe's counter-signature as secretary. The signatures of the two directors, which it bore, were forged, and the seal of the company, which it also bore, had been fraudulently affixed to it by Rowe, who, as secretary, had access to it at all times, and, as it appears to me, practically the custody of it, in the safe of the defendant company.

Messrs. Lazard Brothers & Co., by their solicitors, applied to the defendant company for the registration of Rosenhain and Alexandre in the books of the defendant company as the owners of the shares. The defendant company refused to accede to the application. Then Lazard Brothers & Co. applied to the plaintiffs for other equivalent security or repayment of the loan of 20,000*l*. The plaintiffs have paid Lazard Brothers & Co. the amount of the loan, with interest, and thereupon, as the defendant company refuse to register the ownership of Rosenhain and Alexandre or recognise their title to the shares, they have brought the present action, after obtaining from Lazard Brothers & Co. an assignment of that company's rights, if any, and giving written notice of such assignment to the defendant company. In this action the plaintiffs claim against the defendant company. They also claim against Bewick, Moreing & Co. as the partners of Rowe. Lazard Brothers & Co. and Alexandre are, as I have said, defendants only in form.

At the trial, which took place before Kennedy J. and a special jury, the following admissions of fact were made: (*a*) that the alleged certificate is not a valid or genuine document, and that the signatures thereon other than the signature of Rowe are forgeries; (*b*)—(1.) that the bank (Lazard Brothers & Co.) and the parties respectively made the advances upon the faith of the genuineness and validity of the alleged certificate and of its being properly issued, and (2.) that the secretary was a proper person to deliver it; (*c*) that Rowe in creating and delivering to Lindo the alleged certificate acted fraudulently and not for or on behalf of or for the benefit of the defendant company, and solely for himself and for his own private purposes and advantage; (*d*) that the defendant company did not by its directors or otherwise authorize Rowe to make, seal, or

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issue the alleged document; (*e*) that during the month of December, 1902, at all events, Rowe was a partner in the firm of Bewick, Moreing & Co.

On these admissions the jury was discharged, and the case was argued before the judge alone.

Rufus Isaacs, K.C. (*J. D. Crawford* with him), for the plaintiffs. The case is really governed by *Shaw* v. *Port Philip Gold Mining Co.* (1), and that decision is binding on this Court. The principle there laid down was that if the servant of a company acting within the scope of his employment fraudulently issues a certificate in the authorized form the company are bound by his act. In *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (2) the facts were very different. The secretary to the company in that case was held out by the company as the person to answer inquiries, and he fraudulently and falsely answered inquiries put to him, not for the benefit of the company, but for his own benefit, and it was held that the company were not liable. The question in each case is whether the secretary was authorized to do an act which if validly done would bind the company. If he was, and there was nothing to disclose the fraud to the person defrauded, the company must be held liable.

It was formerly doubtful whether a company could by means of an estoppel be held liable for an act which was ultra vires: *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (2); but that doubt was finally removed by the decision of the House of Lords in *Balkis Consolidated Co.* v. *Tomkinson.* (3) A certificate bearing the seal of the company, and issued by the secretary of the company, ought on grounds of public policy to be binding on the company: *Burkinshaw* v. *Nicolls.* (4) A certificate is quite a different thing to a certification of transfer, which, when given fraudulently by a secretary, has been held not to estop the company: *George Whitechurch, Ld.* v. *Cavanagh.* (5) So in regard to any other act done by the

(1) 13 Q. B. D. 103.
(2) (1887) 18 Q. B. D. 714.
(3) [1893] A. C. 396.
(4) (1878) 3 App. Cas. 1004.
(5) [1902] A. C. 117.

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secretary of a company for his own benefit where the seal of the company is not necessary. When the seal of a company has apparently been affixed to a document with all due regularity the company cannot be heard to say that it has been so affixed without authority: *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.* (1); *Royal British Bank* v. *Turquand* (2); *Mahony* v. *East Holyford Mining Co.* (3) Here it was necessary to have the signatures of two directors as well as that of the secretary and the seal. Can it be necessary for members of the public to see that the signatures of the directors are genuine? Even if they were, it has recently been decided that if they sign, not on behalf of the company, but on their own behalf, they do not bind the company: *Hambro* v. *Burnand.* (4) Here there was an estoppel by holding out, and it is not suggested that there was an estoppel by negligence. The fact that the company have left their seal in the hands of their secretary, who has authority to make use of it, is no negligence on their part: *Merchants of the Staple of England* v. *Bank of England* (5); *Bank of Ireland* v. *Trustees of Evans' Charities.* (6) But the question really comes back to this: Has *Shaw* v. *Port Philip Gold Mining Co.* (7) been overruled? Palmer (8) treats it throughout as good law, and although other text-writers express doubts as to the correctness of the decision (9) there is no reported case which assumes to overrule it, or even to comment adversely upon it. [He also referred to *Simm* v. *Anglo-American Telegraph Co.* (10)]

Lawson Walton, K.C. (*Bremner* with him), for the Great Fingall Consolidated. The case of *Shaw* v. *Port Philip Gold Mining Co.* (7) is distinguishable. It was decided on the authority of *In re Bahia and San Francisco Ry. Co.* (11); but that case does not really support it: see *In re Ottos Kopje*

(1) [1895] 1 Ch. 629.
(2) (1856) 6 E. & B. 327.
(3) (1875) L. R. 7 H. L. 869.
(4) [1903] 2 K. B. 399.
(5) (1887) 21 Q. B. D. 160.
(6) (1855) 5 H. L. C. 389.
(7) 13 Q. B. D. 103.
(8) Palmer's Company Precedents, 8th ed. pp. 625, 640.
(9) Buckley's Companies Acts, 8th ed. p. 117; Lindley on Companies, 6th ed. p. 668.
(10) (1879) 5 Q. B. D. 188.
(11) (1868) L. R. 3 Q. B. 584.

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Diamond Mines. (1) The facts of this case differ from those in *Shaw* v. *Port Philip Gold Mining Co.* (2) Lindo did not know that Rowe was the secretary of the company, and did not go to him at the company's offices as such. *Shaw* v. *Port Philip Gold Mining Co.* (2) is, however, the only case in the books in which a forged certificate has been held to bind a company. Here the certificate was really a nullity, the signatures of the two directors which it purported to bear were forgeries, and the seal must be treated as a forged signature also. It is, therefore, not the deed of the company at all: *Bank of Ireland* v. *Trustees of Evans' Charities* (3); *Swan* v. *North British Australasian Co.* (4); *D'Arcy* v. *Tamar, Kit Hill and Callington Ry. Co.* (5); *Mahony* v. *East Holyford Mining Co.* (6); *Merchants of the Staple of England* v. *Bank of England.* (7) The case of *Shaw* v. *Port Philip Gold Mining Co.* (2) is treated with disapproval by the text-writers, and cannot be supported. (8) Where a servant does an act for his own purpose, and without the authority of his master, the master is not responsible. He is only liable where the servant is acting within the scope of his authority: *Limpus* v. *London General Omnibus Co.* (9); and the same principle applies in regard to the secretary of a company: *Barwick* v. *English Joint Stock Bank* (10); *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (11); *McGowan* v. *Dyer.* (12) [He also cited *Torkington* v. *Magee.* (13)]

J. Eldon Bankes, K.C. (*Norman Craig* with him), for Bewick, Moreing & Co.

S. A. T. Rowlatt, for Lazard Brothers.

Rufus Isaacs, K.C., in reply, referred to *Collen* v. *Wright* (14); *Starkey* v. *Bank of England* (15); *Sheffield Corporation* v.

(1) [1893] 1 Ch. 618.
(2) 13 Q. B. D. 103.
(3) 5 H. L. C. 389.
(4) (1863) 2 H. & C. 175.
(5) (1866) L. R. 2 Ex. 158.
(6) L. R. 7 H. L. 869.
(7) 21 Q. B. D. 160.
(8) Buckley's Companies Acts, 8th ed. pp. 103, 117; Lindley on Companies, 6th ed. p. 668.
(9) (1862) 1 H. & C. 526.
(10) (1867) L. R. 2 Ex. 259.
(11) 18 Q. B. D. 714.
(12) (1873) L. R. 8 Q. B. 141.
(13) [1902] 2 K. B. 427; [1903] 1 K. B. 644.
(14) (1857) 8 E. & B. 647.
(15) [1903] A. C. 114.

Barclay (1); *Houldsworth* v. *City of Glasgow Bank* (2); *Duck* v. *Tower Galvanizing Co.* (3); *McKay* v. *Commercial Bank of New Brunswick* (4); *Swire* v. *Francis.* (5)

Feb. 6. The following judgment was read by

KENNEDY J. The principal, although not the only, question in this action is whether the plaintiffs are or are not entitled to recover damages from the defendant company by reason of the company's refusal to place the names of Max Rosenhain and Edmond Alexandre on the register of shareholders. The material facts are these. [The learned judge then stated the facts as above set out, and continued:—]

The action came on for trial before me sitting as judge with a special jury. After I had heard evidence of witnesses called by the plaintiffs and by the defendants from which I have taken the history of the case, set forth above, and which, as there is really no conflict as to the facts, I see no use in stating more particularly, certain statements or admissions of material facts were agreed to by the counsel for the respective parties, which left, in my judgment, no question which it was necessary or proper to leave to the jury. These statements or admissions of fact were as follows: Agreed—(1.) That the alleged certificate is not a valid or genuine document, and that the signatures thereon, other than the signature of Rowe, are forgeries; (2.) that (*a*) the bank (Lazard Brothers & Co.) and the parties respectively made the advances upon the faith of the genuineness and validity of the alleged certificate and of its being properly issued, and (*b*) the secretary was a proper person to deliver it; (3.) that Rowe, in creating and delivering to Lindo the alleged certificate, acted fraudulently and not for or on behalf of or for the benefit of the defendant company, and solely for himself and for his own private purposes and advantage; (4.) that the defendant company did not by its directors or otherwise authorize Rowe to make, seal, or issue the alleged document; (5.) that during the month of December,

(1) [1903] 2 K. B. 580.
(2) (1880) 5 App. Cas. 317.
(3) [1901] 2 K. B. 314.
(4) (1874) L. R. 5 P. C. 394.
(5) (1877) 3 App. Cas. 106.

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1902, at all events, Rowe was a partner in the firm of Bewick, Moreing & Co. Mr. Rufus Isaacs, for the plaintiffs, submitted that there still was a question which ought to be left to the jury as to the liability of the defendants Bewick, Moreing & Co., under the Partnership Act, 1890, s. 10. I ruled, however, that there was no case made out against Bewick, Moreing and Co., and as the only questions of fact, which would otherwise have been questions for the jury, had been settled by the foregoing agreed statements and admissions, the jury was discharged, and the claim of the plaintiffs as against the defendant company was fully argued before me.

The plaintiffs' case against the Great Fingall Consolidated, Limited, is based upon the assertion of a right of the plaintiffs to recover damages from that company for its refusal to recognise the certificate, and register in its books the names of Rosenhain and Alexandre as the owners of the shares numbered in the certificate. It is unquestionably true that upon the faith of this certificate the plaintiffs incurred their liability to Lazard Brothers & Co., and advanced the 20,000*l.* (less stamp fee and commission) to Rowe. If the defendant company is estopped by the certificate from denying the title of Rosenhain and Alexandre, it has, in my view, been decided by the House of Lords that the plaintiffs are entitled to recover from the company the damages (not exceeding the value of such shares at the date of the company's refusal to register) which they have in fact sustained owing to the refusal of the company to register the purchaser: *Balkis Consolidated Co.* v. *Tomkinson.* (1) At p. 407 Lord Herschell disposes of an adverse argument which had appeared in the judgment of Bowen L.J. in the case of *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (2), and also in the judgment of Comstock J., delivered for the Court of Appeals in the American case of *Mechanics' Bank* v. *New York and New Haven Ry. Co.* (3), as to the transaction which it was sought to enforce against the company being ultra vires of the company, and therefore one as to which there would be no right to hold the company liable

(1) [1893] A. C. 396.
(2) 18 Q. B. D. 714.
(3) (1855) 4 Duer (11 N. Y. Sup. Ct.) 480, at pp. 574–6.

by estoppel. In the course of his remarks upon this point Lord Herschell said: "I do not think this argument is a sound one. A person to whom the company is liable by estoppel to pay damages for refusing to register his transfer does not by reason thereof become a shareholder. Indeed, the very title by estoppel implies that he is not one. It has never been laid down, and is manifestly not the law that a company is not authorized to employ its funds in paying damages for a wrong done, and, if his right by estoppel is established, the company have as much committed a wrong by refusing to register as shareholder the person whose title they deny as if his title to be registered had in fact been a good one." A further and what I may call a subordinate point was raised by the defendants, that I ought to hold that no right by estoppel could be asserted by the present plaintiffs because (it was said) the plaintiffs were in the same position as the parties who were held to have no such right in *Simm* v. *Anglo-American Telegraph Co.* (1); but it appears to me that the circumstances of the two cases are essentially different.

The real question is, Do the facts of the present case create a right by estoppel? This was the question, or, at all events, the main question, which was fully and ably argued before me by the learned counsel who appeared for the defendant company. The argument for the plaintiffs, as I understand it, is substantially this. Instruments under seal have always been regarded by our law as instruments of especial solemnity. In old days, whilst it was a defence to an action on a contract under seal that the party's seal had been lost and had been affixed by a stranger without his knowledge, at least if the owner had given public notice of the loss, no such defence was open if the seal had been misapplied by a person in whose custody it was; for then, it was said, it was his own fault for not having it in better keeping: see Pollock's Principles of Contract, 7th ed. p. 138, and note (*n*), where the authorities are cited. And in modern days, in regard to the certificates of shares in limited trading companies, the law recognises, for practical and business reasons, a high degree of responsibility

(1) 5 Q. B. D. 188.

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resting on the companies whose seal they bear. Stress is laid upon this by the judgments of Cockburn C.J. and Blackburn J. in *In re Bahia and San Francisco Ry. Co.* (1) "It was the intention of the Legislature," said Blackburn J. (2), "that these certificates should be documents on which buyers might safely act." It is unnecessary to quote at length the well-known passage in the judgment of Lord Cairns L.C. in *Burkinshaw* v. *Nicolls*. (3) The 31st section of the Companies Act, 1862 (25 & 26 Vict. c. 89), enacts that "a certificate under the common seal of the company, specifying any share or shares, or stock held by any member of a company, shall be primâ facie evidence of the title of the member to the share or shares or stock therein specified." In the present case the certificate was on its face perfectly regular; it purported to be issued according to the formalities prescribed by the articles of the defendant company—i.e., to be signed by two directors and countersigned by the secretary; it was delivered at the company's office as the genuine certificate of the company by the secretary who had countersigned it and affixed to it the company's seal, to which the company permitted him to have access for the purpose of using it; it is admitted that he was a proper person to deliver such certificates. The certificate was a forged document, no doubt, but as it is apparently genuine and regular, and as it was received by the plaintiffs from a proper custodian and from the company's office, it is argued by the plaintiffs that there was no legal duty on the plaintiffs, who received it, to ascertain, or try to ascertain, the genuineness of the directors' signatures, or to inquire whether the seal had been affixed by the authority of the directors. "Where the regulations contain special provisions as to the affixing of the seal, e.g., that the instrument must also be signed by two directors, those who deal with the company are bound to see that the deed on the face of it accords with the regulations. . . . But subject as aforesaid, it is to be presumed that where the common seal is affixed to an instrument it has been duly affixed, and the burden of proving the contrary rests with

(1) L. R. 3 Q. B. 584. (2) L. R. 3 Q. B. at p. 596.
(3) 3 App. Cas. 1004, at p. 1017.

those who allege it . . . . It by no means follows that where the seal has been irregularly affixed, the instrument is ineffective: see *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.* (1); see also *Shaw* v. *Port Philip Gold Mining Co.* (2) In both these cases the seal had been irregularly affixed to an instrument; but the company was held bound by it, for the instrument appeared to be in accord with the regulations, and the irregularity was only in regard to the 'indoor' management, with which an outsider, acting in good faith, is not concerned." (3) Finally the plaintiffs contend that this case is covered by direct authority which is binding upon this Court They say that in *Shaw* v. *Port Philip Gold Mining Co.* (2) the facts, which were there stated in a special case, were practically identical with those with which I have to deal. The secretary of the defendant company in that case fraudulently forged the director's signature to a share certificate, affixed the company's seal without authority, and issued it to one Gledhill, who took it in good faith. Gledhill deposited the certificate with the plaintiff as security for advances, and executed a transfer of the shares to the plaintiff. The company refused to register the plaintiff as owner of the shares. The Divisional Court, Stephen and Mathew JJ., held the company liable for the agreed value of the shares, the question for the Court being, as stated in the special case, whether the plaintiff had a good title to the shares as against the company. Stephen J. bases his judgment on the ground of estoppel, as established by the case of *In re Bahia and San Francisco Ry. Co.* (4) He said (5): "It is said in answer that here the secretary carried out his fraud by means of forgery. It appears to me that this fact does not make any material difference. The defendants' counsel said it did make a difference on the ground, so far as I understand his argument, that nothing can give validity to a forged instrument as against anybody. That does not seem to me to be the case, and I think the authorities cited for the plaintiff are applicable. The company appear in this case to have

(1) [1895] 1 Ch. 629.
(2) 13 Q. B. D. 103.
(3) Palmer's Company Precedents, 8th ed. pp. 70, 71.
(4) L. R. 3 Q. B. 584.
(5) 13 Q. B. D. at p. 107.

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prescribed certain formalities with regard to the use of the seal and the issue of certificates. The certificate is to be signed by a director and the secretary. In the present case it apparently does comply with those formalities . . . . A person can inform himself whether the certificate comes from the secretary because he gets it from the secretary's office, but I do not see how, according to any practicable course of business, he can go behind the certificate and ascertain for himself such matters as whether the signature of the director is genuine. It appears to me, therefore, that the company have authorized the secretary, and made it his official duty, to act in such a way that his acts amount to a warranty by them of the genuineness of the certificate issued by him." Mathew J. concurred upon the same grounds, and in the course of his judgment said (1): "It is obviously indispensable in the ordinary course of business that the secretary should perform these duties," (i.e., the execution of the certificate with the prescribed formalities and its issue) "and it never could have been contemplated that the purchaser of shares should himself ascertain that each of the prescribed formalities had, in fact, been complied with . . . . It was argued by the counsel for the defendants that the fact that the certificate was a forgery prevented their being liable for the act of their agent, but he failed, as it appeared to me, to establish any difference for this purpose between a fraud carried out by means of forgery and any other fraud."

To these arguments of the plaintiffs the defendants oppose the doctrine which was enunciated by Willes J. in his judgment in the Exchequer Chamber in *Barwick* v. *English Joint Stock Bank* (2), and which, after being approved in the House of Lords and in the Privy Council, formed the basis of the decision of the Court of Appeal in 1887 in *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (3) That doctrine, as stated in the head-note of the last-mentioned case, is that a principal is not liable in an action of deceit for the unauthorized and fraudulent act of a servant or agent, committed, not

(1) 13 Q. B. D. at p. 108. (2) L. R. 2 Ex. 259.
(3) 18 Q. B. D. 714.

for the general or special benefit of the principal, but for the servant's or agent's private ends. It is urged that this principle is applicable here, because, unquestionably, Rowe's acts in forging and issuing the certificate were done for his own personal advantage, and in no way for, or in the interest of, the company, and the company has received no benefit from them. It is, as the defendants urge, not the case of a document which has been issued irregularly, or without the proper formalities or authorization according to the company's articles, as, for example, the mortgage in *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.* (1), which is referred to by Mr. Palmer in the passage from his book which I have quoted above, but it is the case of a certificate which was never "issued," in any proper sense of the term, *by the company*. It is the case of a mere forgery committed by a servant of the company by means of a dishonest and unauthorized use of the company's seal wholly for his own private ends. The defendants rely also upon the case recently decided in the House of Lords, *George Whitechurch, Ld.* v. *Cavanagh*. (2) In that case the House of Lords (Lord Robertson doubting) held, reversing the decision of Bigham J. and of the Court of Appeal, that a limited company was not estopped by a fraudulent "certification" of their secretary that certificates for shares were in the company's office from shewing that the proposed transferor had no shares to transfer. There are, no doubt, in the judgments of the noble and learned Lords important observations upon the doctrine of representation by estoppel which make for the defendants' contentions in the present case; but the decision of the House of Lords is as to the existence of an estoppel in the case of a certification—a very different class of document from a share certificate under seal, and both Lord Macnaghten and Lord Brampton expressly refer to that difference. "There is a marked difference," said Lord Macnaghten (3), "between a certificate and a certification. A certificate is under the seal of the company. By the Companies Act, 1862, a certificate is made primâ facie evidence of title. If faith were not given to the solemn assertions of a company under its common seal, "it

(1) [1895] 1 Ch. 629. (2) [1902] A. C. 117. (3) [1902] A. C. at p. 126.

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would," as Lord Cairns observed in *Burkinshaw* v. *Nicolls* (1), "paralyze the whole of the dealings with shares in public companies." A certification stands on a different footing altogether. Transfers are never certified under the company's seal. There is no obligation on a company to certify transfers at all. The certification is not passed by the directors or brought before the board." Lord Brampton said (2): "I take it to be common knowledge of all intelligent men of business that there is a wide and well-recognised difference between a certificate of shares under the seal of the company, which, by s. 31 of the Companies Act of 1862, is made primâ facie evidence of the title of the person named in it to the shares therein specified—see *In re Bahia and San Francisco Ry. Co.* (3)—and a transfer certification such as that which appears on the margin of the transfers in question." It appears to me that these pointed discriminations between "share certificates" and "certifications" are fairly relied upon by the plaintiffs' counsel as tending to support that part of his argument which rests on the special character of the document in the present case.

It appears to me that my judgment properly depends upon the answers which ought to be given to three questions: (1.) Is this case distinguishable, on the facts, from *Shaw* v. *Port Philip Gold Mining Co.*? (4) (2.) If not, has that decision been overruled, or so treated in subsequent cases that it ought to be treated by me as overruled? (3.) If it has been overruled, either expressly or by implication, then upon principle and authority, apart from that case, are the plaintiffs entitled to succeed in the present action?

In regard to the first question, I have come to the conclusion that the two cases are in their material facts really indistinguishable. In each case the share certificate, on the faith of which the plaintiff has acted to his loss, was a forgery; in each case that forgery was the act of the secretary of the defendant company acting for his own purposes and profit, and not for or on behalf of or for the benefit of the company. The defendants' counsel in the present case suggested, but not,

(1) 3 App. Cas. 1004.
(2) [1902] A. C. at p. 137.
(3) L. R. 3 Q. B. 584.
(4) 13 Q. B. D. 103.

I think, strongly, that some difference might exist in the fact that Lindo, when he went to the defendant company's office and obtained the certificate, did not know that Rowe was the secretary, and believed him to be a director; and that the certificate was given by Rowe, not in the room marked "Transfer Office," or in a room in any way specially appropriated to the defendant company, but in one of the rooms in the office which might be the board room of one of the other companies, which, like the defendant company, had their office in Bewick, Moreing & Co.'s premises. I do not think that these circumstances can be held to make any real difference between the two cases. Lindo expressly deposed that he took the transfer to Rowe as an official of the defendant company, and I see no reason to doubt that he received the certificate also from him as an official of the defendant company. Before he acted on the certificate he knew that Rowe was the secretary. Rowe as secretary was superior to, and, as the defendants' head clerk stated, as secretary, responsible for, the clerks in the transfer department; and I fail to see how anything can turn upon the designation of the room in which the certificate was handed over to Lindo.

This brings me to the second question: Has *Shaw* v. *Port Philip Gold Mining Co.* (1) been overruled or disapproved in any way which entitles me to disregard it as an authority of the Divisional Court of the Queen's Bench Division which binds me sitting at Nisi Prius? No judgment expressly overruling or disapproving of the case was cited to me by counsel, dan after careful search I have been unable to find any. In Lord Lindley's Law of Companies it is twice cited. At p. 82, 6th ed., it is referred to in, with other cases and without comment, a note to the statement in the text that "the company cannot dispute the truth of the certificate as against the person to whom it is issued if he has suffered loss by acting or remaining inactive on the faith of it, or as against a person who has bought on the faith of it." At p. 668 it is referred to, and its effect and material facts are set out in the text itself, and a note is appended: "*Quære*, whether in this case the

(1) 13 Q. B. D. 103.

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secretary was acting for the company so as to bind it by his acts: see the *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.*" (1) In Mr. Justice Buckley's book on the Companies Acts, 8th ed., it is twice cited, not as being overruled by any later decision, but with the author's disapproval. At p. 103, after summarizing the case, the author proceeds: "It is conceived that this case misapplied the principle of *Barwick* v. *English Joint Stock Bank* (2), for the secretary was clearly acting not 'for the benefit,' i.e., 'for' or 'on behalf' of the company, but for his own interest, and in such case the company is not, in an action for deceit, liable for fraud of its agent." At p. 117, after a reference to the law as laid down in the *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (1), the learned author says that the decision in *Shaw* v. *Port Philip Gold Mining Co.* (3) cannot, it is conceived, be reconciled with the principle as stated by the Court of Appeal in the former case. In Mr. Palmer's work on the Law of Companies (4) the case is frequently cited, and nowhere with disapproval, or with any intimation that in the writer's opinion it can be treated as overruled.

Now, although I myself might not have so decided, I should not be justified as a judge sitting at Nisi Prius in not conforming to a judgment of the Divisional Court which has not been expressly overruled or judicially disapproved, unless it was absolutely and unquestionably clear that it was inconsistent and could not be reconciled with later decisions of higher authority. I cannot say this in the present case. The guarded form in which such eminent authorities as Lord Lindley and Buckley J. express their doubts of the correctness, in view of later cases, of the judgment of Mathew L.J. and Stephen J. in *Shaw* v. *Port Philip Gold Mining Co.* (3) affords in itself strong reason for my conclusion on this point. And, further, the thought which I have given to the matter since the trial has suggested to me two considerations which it might be argued, at all events, should be held to enable the law as laid

(1) 18 Q. B. D. 714.
(2) L. R. 2 Ex. 259.
(3) 13 Q. B. D. 103.
(4) Palmer's Company Law, 2nd ed., 1898 (twice cited); Palmer's Company Precedents, 8th ed., 1902 (five times cited).

down in *Shaw* v. *Port Philip Gold Mining Co.* (1) to be upheld without encroachment upon the principle of law enunciated by Willes J. in *Barwick* v. *English Joint Stock Bank* (2), and enforced by the Court of Appeal in the *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (3) The first of these considerations is that the doctrine is enunciated by Willes J., and is approved and applied in the last-named case, expressly in reference to an action of deceit. The right claimed by the plaintiffs in the case before Mathew L.J. and Stephen J., like the right claimed by the plaintiffs in the present case, to use the language of Bramwell L.J. in *Simm* v. *Anglo-American Telegraph Co.* (4), is a right by estoppel. The claims in such an action and in an action of deceit are not identical, and the measure of the damages is not, I think, necessarily the same, though it may be so in some cases. The claim in *Shaw* v. *Port Philip Gold Mining Co.* (1) was for compensation measured by and limited to the value of the shares, the plaintiff's title to which by estoppel the Court held to have been wrongly denied by the defendant company. In an action of deceit the defendant, if held liable, is liable to a judgment for all the pecuniary loss of the plaintiff which has flowed naturally from the deceit.

The second consideration is that which arises from the fact that in *Shaw* v. *Port Philip Gold Mining Co.* (1), as in the present case, the case depended upon the liability of the company sued, not in respect of oral representations of a secretary as in the *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (3), nor in respect of a fraudulent "certification," which formed one of the two bases of claim in *George Whitechurch, Ld.* v. *Cavanagh* (5), but in respect of a share certificate under the company's seal, apparently genuine, created in the company's office by the company's servant, and issued to the recipient by a proper officer of the company; a document of a class to which, in the eye of the law of England, solemnity has always attached, and to which, in the case of trading companies, the Legislature intended, and, as Lord Cairns, Lord

(1) 13 Q. B. D. 103.
(2) L. R. 2 Ex. 259.
(3) 18 Q. B. D. 714.
(4) 5 Q. B. D. 188.
(5) [1902] A. C. 117.

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Blackburn, Lord Esher, and Lord Macnaghten have from time to time emphatically pointed out, the interests of mercantile business require, that a large extent of faith should be given.

After giving, however, full weight to these considerations, not only as they may arguably be used to reconcile *Shaw* v. *Port Philip Gold Mining Co.* (1) with such cases as the *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (2), but also as they may be used to support the plaintiffs' contention in the present case; after giving also, I hope, full weight to the arguments so ably put before me by the plaintiffs' counsel, I still feel myself bound to say that I decide this case, as I do, in the plaintiffs' favour simply because I cannot on the facts distinguish this case from *Shaw* v. *Port Philip Gold Mining Co.* (1), and by that case I feel myself bound. If I had not felt myself so bound—I say it, of course, with profound respect for the learned judges who decided it—I should have preferred the view that a company is not in such a case as the present legally liable to make good the loss to a third party which has been caused by the fraud and forgery of its servant, wholly without authority, and not for the company's purposes or benefit, but solely for his own private purposes and ends. Of course, in a case of so much gravity, and in which so large a sum of money depends upon the issue, the litigation will not stop here, and I have felt it my duty to deal at a length which I should otherwise have wished to avoid with the facts and the arguments and considerations relevant to those facts, in order to give all the help I may to the parties concerned and to those who may hereafter have to consider this important case. I give judgment for the plaintiffs. I think the exact amount was practically agreed between counsel.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Gilbert Samuel & Co.*

Solicitors for defendants, the Great Fingall Consolidated: *Ashurst, Morris, Crisp & Co.*

Solicitors for Lazard Brothers: *Lyne & Holman.*

Solicitors for Bewick, Moreing & Co.: *Bompas, Bischoff & Co.*

(1) 13 Q. B. D. 103. (2) 18 Q. B. D. 714.

A. P. P. K.

[IN THE COURT OF APPEAL.]

C. A.
1904
Feb. 5.

STONE & CO. *v.* THE MIDLAND RAILWAY COMPANY.

Railway—Contract of Carriage—Conveyance of Goods by Passenger Train—Agreement for Carriage in absence of Obligation—Collection and Delivery—Inclusive Charge—Equality Clause of Special Act—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *s.* 90.

A schedule of the statutory maximum rates and charges authorized to be taken by a railway company for the conveyance of goods contained a provision that the company should not be under obligation to carry non-perishable goods by passenger train. A section of a special Act of the company provided that all tolls should be charged equally to all persons. The company announced to the public their willingness to carry tailors' clothing by passenger train at a "collected and delivered" rate specified in a scale of charges which they published. The plaintiffs, who were common carriers at Bristol, sent parcels of tailors' clothing from Bristol to Southampton by the company's passenger train, having themselves collected the goods at Bristol and handed them over to the company at their passenger station. The plaintiffs paid to the company, under protest, the scale charge; and brought an action against them for money had and received, claiming to be entitled to a rebate from the defendants in respect of the collection of the goods at Bristol:—

Held, that, as the company were under no statutory obligation to carry the goods by passenger train, the plaintiffs were not entitled to any rebate.

Judgment of the King's Bench Division, [1903] 1 K. B. 741, affirmed.

Appeal from the judgment of a Divisional Court, reported [1903] 1 K. B. 741, in favour of the defendants, upon an appeal from a decision of the judge of the Bristol County Court.

It appeared from the county court judge's notes that the plaintiffs were common carriers at Bristol. Since April, 1900, they had collected from the warehouses at Bristol heavy goods and parcels for transit by the defendants' railway to Southampton Docks, and had handed them over to the defendants at their goods or passenger station, as the case might be, at Bristol. An order made by the Board of Trade and confirmed by the Midland Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 Vict. c. ccxix.), contains

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a schedule of the maximum rates and charges which the defendants are authorized to charge for the conveyance of merchandise (including clothing) by merchandise train, and of the maximum rates and charges authorized in respect of perishable merchandise carried by passenger train. Part V., clause 3, provides: "The company shall not be under obligation to convey by passenger train, or other similar service, any merchandise other than perishables."

The defendants carried parcels by passenger train from Bristol under two scales of charges—one scale applying where they undertook the ordinary liability of common carriers, and the other applying where goods were carried at "owner's risk." The two scales were set out in a book published by the defendants, entitled, "List of Rates Arrangements for the Conveyance of Parcels by Passenger Trains from Bristol." The "owner's risk" scale had appended to it a description of a large number of articles, including "Tailors' unfinished and finished clothing," and against this item were placed the letters "*c*, *d*." Those letters were explained by foot-notes as follows: "*c* including collection," and "*d* including delivery." The plaintiffs had notice of the terms, as stated in the book, upon which the railway company were willing to carry tailors' goods by passenger train. [The county court judge came to the conclusion that the proper inference of fact to be drawn from the evidence was that the charge for the carriage of tailors' goods by passenger train at "owner's risk" included a charge for collection and delivery.] On August 7, 1901, the plaintiffs collected and handed over to the defendants at their passenger station at Bristol three boxes of tailors' goods to be carried by passenger train at owners' risk, and they paid to the defendants, under protest, the sum of 1*l.* for the carriage of the boxes to Southampton, being the amount of the scale rate, which was 3*s.* 6*d.* per cwt. The plaintiffs claimed to be entitled to a rebate of 1*s.* in respect of the collection of the goods by them, and sought to recover that sum as money had and received by the defendants to their use.

The county court judge gave judgment for the plaintiffs for the amount claimed.

On appeal by the defendants the decision of the county court judge was reversed by the Divisional Court (Lord Alverstone C.J., Wills J., and Channell J.), and judgment was given for the defendants. (1)

The plaintiffs appealed.

Foote, K.C., and *F. E. Weatherley* (*Balfour Browne, K.C.*, with them), for the plaintiffs. The cases fully establish that where a railway company undertakes to carry goods by goods train at a rate including collection and delivery a person who himself collects the goods and delivers them at the departure station is entitled to a rebate: *Baxendale* v. *Great Western Railway*. (2) As pointed out in the judgment of the Exchequer Chamber in that case, a charge for collection and delivery against those who do not require the performance of those services is manifestly unreasonable and unequal. The principle is equally applicable to the present case. Sect. 90 of the Railways Clauses Consolidation Act, 1845, imposes the obligation that tolls are to be charged equally to all persons. (3) No doubt the tolls there referred to are the tolls "by the special Act authorized to be taken," and it may be said that under their special Act there are no authorized tolls with regard to such traffic as was carried in this case. The answer to that suggestion is that, though relieved of the obligation to carry these goods, the company do in fact carry them, and do so by virtue of the powers of their special Acts. At any rate the terms of the equality clause (s. 203) of the special Act of 1844 (4) are wider, for it is provided that "all" tolls shall be

(1) [1903] 1 K. B. 741.

(2) (1863) 14 C. B. (N.S.) 1; (1864) 16 C. B. (N.S.) 137.

(3) 8 & 9 Vict. c. 20, s. 90, enacts that it shall be lawful for the company, subject to the provisions and limitations therein and in the special Act contained, to alter or vary "the tolls by the special Act authorized to be taken . . . . as they shall think fit; provided that all such tolls be at all times charged equally to all persons, and after the same rate. . . ."

(4) 7 & 8 Vict. c. xviii., s. 203: "All tolls for the use of the railway shall be at all times charged equally to all persons, and after the same rate, whether per mile or per ton per mile, or otherwise, in respect of all goods, animals, or carriages of a like description, and conveyed or propelled by a like carriage or engine; and all tolls or charges for conveyance by the company or for the use of carriages or locomotive power shall be at all times charged equally to all persons."

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charged equally, not merely those fixed in amount by statute. The company, therefore, who are empowered to charge tolls for carriage over their line, are not entitled to demand a collection and delivery rate where the goods are not collected by them.

Cripps, K.C., and *W. G. Clay* (with them *W. J. Noble*), for the defendants. The equality clauses of the Railways Clauses Consolidation Act, 1845, and of the company's special Act of 1844, apply only to statutory charges for the carriage of goods. In this case the company are under no obligation to carry the goods by passenger train. It is not ultra vires on their part to do so, but if they offer to carry them on certain terms it is open to the plaintiffs to accept or to decline the offer. They cannot insist on a station to station rate, which is in effect what they are seeking to do, for they are in the same position with respect to the carriage of these goods by passenger train as if they were dealing with an ordinary carrier. Not being bound to carry the goods, the company can impose any terms that they please for the accommodation which they offer, as pointed out by Lindley J. in the case of a carrier who does not hold himself out as a carrier of dogs and is not obliged to carry them: *Dickson* v. *Great Northern Railway*. (1) They cannot be compelled to allocate to collection any part of the charge that they make; and they make it equally to every person who desires to accept their offer to convey non-perishable goods by passenger train. There is no obligation on the company to make a charge for collection, and they may treat the matter as if they collected gratuitously: *Tomlinson* v. *London and North Western Railway* (2) and *New Union Mills Co.* v. *Great Western Railway*. (3) In this action no question of reasonable facilities for the carriage of the goods can arise, for a complaint on such a matter, if it can be raised in a case like the present, must go before the Railway Commissioners.

Foote, K.C., in reply.

COLLINS M.R. This is an action by carriers against the Midland Railway Company, claiming to recover money demanded

(1) (1886) 18 Q. B. D. 176, at p. 183.

(2) Not reported on this point, but see [1896] 2 Q. B. at p. 295.

(3) [1896] 2 Q. B. 290.

and received from the plaintiffs beyond the amount that it is said the company were entitled to charge. The claim is made either by reason of s. 90 of the Railways Clauses Consolidation Act, 1845, or of a section of a special Act of the company of the year 1844, both of those sections relating to equality of charges. The railway company say that they are not bound to carry by passenger train goods such as the plaintiffs delivered to them, which are non-perishable merchandise, and that being under no obligation to carry them by passenger train, and there being no statutory toll with respect to them, they do not come within the legislation as to equality contained in either of the two sections to which I have referred.

Sect. 90 of the Railways Clauses Consolidation Act, 1845, is in these terms: "Whereas it is expedient that the company should be enabled to vary the tolls upon the railway so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favouring particular parties, or for the purpose of collusively and unfairly creating a monopoly, either in the hands of the company or of particular parties, it shall be lawful, therefore, for the company, subject to the provisions and limitations herein and in the special Act contained, from time to time to alter or vary the tolls by the special Act authorized to be taken, either upon the whole or upon any particular portions of the railway, as they shall think fit." Then comes the part of the clause which is chiefly relied on: "Provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton, per mile or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances, and no reduction or advance in any such tolls shall be made either directly or indirectly in favour of or against any particular company or person travelling upon or using the railway." Let me point out first that the section is dealing with a power conferred by law on the company to demand tolls and to vary them, and it is that power which is not to be used for the purpose of

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prejudicing or favouring particular parties. It has hardly been contended for the plaintiffs that the clause is not directed to the tolls which by special legislation the company is empowered to demand, and, that difficulty being recognised, the argument on behalf of the plaintiffs has been based principally on s. 203 of the company's special Act of 1844, which runs thus: "Be it enacted, that all tolls for the use of the railway shall be at all times charged equally to all persons." I need not read any more of the section, for the rest is practically in the same words as s. 90 of the general Act. It is suggested that it covers all tolls which are in fact charged by the company, and not merely those tolls which they are authorized by statute to charge, and that it is therefore larger in its terms than s. 90 of the general Act. Looking at the position in which s. 203 occurs in the company's special Act, it appears to be a section in what may be called a code relating to tolls. The Act deals with a number of things, and at s. 198 it comes to the tolls to be levied for the use of the railway, and declares that the company "may lawfully demand any tolls not exceeding the following," and then those tolls are set out. This legislation, therefore, empowers the company to demand certain tolls and limits the amount, and it is to those tolls which are referred to in the following sections up to and beyond s. 203 that s. 203 applies. In my judgment, the subject-matter of the legislation in the special Act in no way differs from that of the general Act. They both relate to statutory rights to demand tolls.

What then are the statutory rights with regard to tolls now governing the defendants' railway? They are to be found in a provisional order, made under the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 24, and setting out a schedule of rates and charges arrived at in the manner provided by that Act. The provisional order was confirmed by an Act of 1891, and thereupon the rates and charges mentioned in the provisional order became those which the company is entitled to charge. There are a number of provisions as to the different services which are to be rendered, and which may be the subject-matter of rates, and, among them, regulations as to the carriage of perishable merchandise by passenger train. In that connec-

tion there is the following clause: "The company shall not be under obligation to convey by passenger train, or other similar service, any merchandise other than perishable." We arrive then at this state of things—that the company is under no obligation to carry non-perishable merchandise by passenger train, that there is no tariff fixed for such carriage, and no obligation to make a tariff. The merchandise in this case was non-perishable, and, while under no obligation to carry it by passenger train, the company have announced that they are prepared to take it from the house of the sender and deliver it at its destination at a certain rate. If that rate were to be analyzed, it might very probably be found to include an element representing the cost of collection and delivery; but the company say that they are willing to afford a certain facility to any one who chooses to take it, but only on payment of an inclusive rate which, it may be taken, includes a charge for collection. The plaintiffs say that they do the collection and then hand over the goods at the defendants' station, and therefore ought not to be charged for collection, and insist on what is in effect a station to station rate. If the senders of goods had a right to such a rate the matter would stand on a different footing; but they have no such right. The plaintiffs cannot claim to insist upon facilities being given for the transit of their goods by passenger train, and it is therefore obvious that they cannot complain that the company refuse to give them a station to station rate. It is true to say, as the learned Lord Chief Justice said in his judgment in the Divisional Court, that the plaintiffs were demanding a facility to which they were not entitled, and that they could only get the facility that they desired upon the terms on which the company offer it.

It has been argued that even though there is no obligation to charge a station to station rate, nevertheless, if the company carry the goods and make for doing so against a person who has himself collected a charge that embraces collection and delivery, that raises an inequality as between him and other persons whose goods the company collect, and *Baxendale* v. *Great Western Railway* (1) was cited in support of the view

(1) 14 C. B. (N.S.) 1; 16 C. B. (N.S.) 137.

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that under such circumstances the equality clauses applied. But when that case is examined it appears that the company were bound to take the goods and carry them, and had a right to demand a toll for doing so. It is true that the amount of the toll was left to their discretion, but it was pointed out that their right to demand any toll was under the exigency of the statute, and that consequently the equality clauses were applicable. The difference in the present case is that this particular charge is governed by no statute, there is no obligation to carry, and no statutory tariff. In fact, I think the case may be summed up in the short and conclusive judgment of Wills J. in the Divisional Court. The learned judge said: "Two principles, which cannot, I think, be contested, apply here, and the combined effect of them is to make the case perfectly clear. One is, that there is no statutory obligation to carry these goods by passenger train; the other, that it is not ultra vires for the company to carry them if they so choose. The combined effect is that, so far as concerns the carriage of articles of this kind by passenger train, the company are on exactly the same footing as a private individual," and the conclusion arrived at by the learned judge is irresistible that the company cannot be compelled to make a fresh contract, which would exclude a part of the services which they might possibly regard as the most profitable.

I am of opinion that the appeal fails.

ROMER L.J. So far as concerns carriage of non-perishable goods by passenger train, the company, since the Act of 1891, is clearly under no obligation to carry, and, if they do carry, it appears to me that they may prescribe as to the termini between which they will carry, and the rate at which they will do so. I think, therefore, that the company are entitled to say that they will only carry non-perishable goods by passenger train from house to house, and will not carry them from station to station, and that they are further entitled to say that they will do so at a rate for carriage which will include collection and delivery. Even if it be admitted that there must be equality of charge, the only equality need be that the inclusive

rate is not charged differently as between different persons availing themselves of the company's offer. I need hardly point out that it cannot be contended that there is inequality merely because one house may be more distant than another. If a man voluntarily chooses to spare the company the necessity of collection he cannot, in my opinion, demand that the company shall treat his case differently from that of others. I agree that the appeal fails.

MATHEW L.J. I am of the same opinion. It seems to me to be clearly made out that the arrangement made by the company with respect to the carriage of non-perishable goods by passenger train is an option given to the public, and that the company can dictate the terms upon which the goods will be carried. The company make a fixed charge for carrying from house to house. The plaintiffs desire to insist on a new contract, under which the company are to carry non-perishable goods from station to station by passenger train. The answer of the company is that they never undertook to make any such contract, and that the plaintiffs must accept the terms that they impose or send their merchandise by goods train. That answer appears to me to be conclusive, and I agree with my learned brothers in thinking that the appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Burgess, Cosens & Co., for Charles E. Isbell, Bristol.*

Solicitors for defendants: *Beale & Co.*

A. M.

1904
March 1.

ALTON URBAN DISTRICT COUNCIL, APPELLANTS; SPICER, RESPONDENT.

Rates—General District Rate—Rateability of Sporting Rights—Assessment in Proportion of One-fourth of net Annual Value—Rating Act, 1874 (37 & 38 *Vict. c.* 54), *s.* 6—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 211.

Where a right of sporting over land within the district of an urban sanitary authority is severed from the occupation of the land, and is let, s. 211 of the Public Health Act, 1875, does not apply to entitle the lessee of that right to be assessed in respect of the same to the general district rate in the proportion of one-fourth part only of the net annual value thereof.

CASE stated under the Summary Jurisdiction Acts by four justices of the county of Southampton, sitting as a Court of summary jurisdiction in and for the petty sessional division of Alton in the same county.

The appellant urban district council preferred a complaint against the respondent before the justices in respect of his non-payment of a general district rate made by them.

At the hearing of the complaint the following material facts were proved or admitted:—

The respondent rented the shooting over certain lands, being arable, meadow, or pasture ground and woodlands within the appellants' district. On March 26, 1903, the appellants made a general district rate at 1*s.* 11*d.* in the pound. The respondent was assessed to the rate in respect of his sporting rights at 5*l.* 7*s.* 4*d.*, being 1*s.* 11*d.* in the pound on a rateable value of 56*l.* On the rate being duly demanded from him he declined to pay 5*l.* 7*s.* 4*d.*, but tendered to the appellants' collector one-fourth of that sum, namely, 1*l.* 6*s.* 10*d.*, which the collector refused to receive. The rate was good on the face of it.

The justices overruled an objection made on behalf of the appellants that, the rate being good on the face of it, they (the justices) had no jurisdiction to adjudicate as to the amount.

They were of opinion that "the sporting rate on the arable, meadow, or pasture ground and woodlands was properly assess-

able only in the proportion of one-fourth part of the net annual value thereof"; and, as a legal tender had been made of that one-fourth part, they refused to make any order upon the complaint. (1)

The question for the opinion of the Court was whether the justices had come to a right decision; and, if not, what should be done in the premises.

Foote, K.C. (*S. H. Emanuel* with him), for the appellants. The decision of this Court is not asked on the question whether the justices had jurisdiction. The justices were wrong in coming to the conclusion that the respondent was assessable to the general district rate in the proportion of one-fourth part only of the net annual value of the rateable hereditament. The tenant of a right of shooting severed from the occupation of the land clearly is not "the occupier of land used as arable meadow or pasture ground only, or as woodlands" within the meaning of s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875. Sect. 6 of the Rating Act, 1874, does not make the lessee of a sporting right, when severed from the occupation of the land, an occupier of the land; it only provides that, for rating

(1) The Rating Act, 1874 (37 & 38 Vict. c. 54), s. 6, provides:—

"(2.) Where any right of sporting, when severed from the occupation of the land, is let, either the owner or the lessee thereof, according as the persons making the rate determine, may be rated as the occupier thereof.

"(3.) Subject to the foregoing provisions of this section the owner of any right of sporting, when severed from the occupation of the land, may be rated as the occupier thereof.

"(4.) For the purposes of this section, the person who, if the right of sporting . . . . is let, is entitled to receive rent for the same, shall be deemed to be the owner of the right."

The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 211, provides:—

"With respect to the assessment and levying of general district rates under this Act the following provisions shall have effect:

"(1.) General district rates shall be made and levied on the occupier of all kinds of property for the time being by law assessable to any rate for the relief of the poor, and shall be assessed on the full net annual value of such property, ascertained by the valuation list for the time being in force, ... subject to the following exceptions regulations and conditions; (namely)

"(*b*) . . . . The occupier of any land used as arable meadow or pasture ground only, or as woodlands . . . . shall be assessed in respect of the same in the proportion of one-fourth part only of such net annual value thereof."

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purposes, he shall be taken to be an occupier in respect of the sporting right, which is an incorporeal hereditament, and is not but for the Act a subject of rating. [He referred to *Eyton* v. *Overseers of Mold.* (1)]

M. M. Macnaghten, for the respondent. The justices' decision was right. They have found as a fact that the respondent rented the shooting over lands used as arable, meadow, or pasture ground, and as woodlands, within the appellants' district, and by virtue of s. 6 of the Rating Act, 1874, he is to be deemed an occupier. The lands are "used" by him as arable, &c., and as woodlands for the purpose of shooting over them. His sporting right involves his going on to the ground, and in that sense he has an occupation. The Legislature cannot have intended to bring about such an anomalous state of things as that the person who is owner or tenant of land of this kind within the district of an urban authority should pay in the proportion of one-fourth part only of the rateable value, but that the shooting tenant should pay on the full rateable value of the hereditament.

Foote, K.C., was not called on to reply.

LORD ALVERSTONE C.J. When the statutory provisions which govern this case are regarded the point raised becomes clear. Prior to 1874 sporting rights were not rateable as separate hereditaments, but they were allowed to be taken into consideration as enhancing the rateable value of the land in respect of which they were exercised. The Rating Act, 1874, s. 6, provided for two cases in which the right of sporting is severed from the occupation of the land. First, by sub-s. 1, where a right of sporting is severed from the occupation of the land, and is not let, and the owner of the right receives rent for the land, the right shall not be separately valued or rated, but the rateable value of the land shall be estimated as if the right were not severed, and if the rateable value is thereby increased, the occupier of the land may, unless he has specifically contracted to pay such rate in the event of an increase, deduct from his rent such portion of the poor

(1) (1880) 6 Q. B. D. 13.

or other local rate as is paid by him in respect of such increase. Secondly, by sub-s. 2, where any right of sporting, when severed from the occupation of the land, is let, either the owner or the lessee thereof, according as the persons making the rate determine, may be rated as the occupier thereof. The Act therefore created a new rateable hereditament independent of occupation in the ordinary sense of the word when considered as the test of rateability. Then follows sub-s. 3, by which the owner of any right of sporting, when severed from the occupation of the land, may be rated as the occupier thereof. That being the state of things, it is clear that under the Act of 1874 a right of sporting could be rated up to the full amount. But then the Public Health Act, 1875, provides, by s. 211, sub-s. 1 (*b*), that the occupier of any land used as arable, meadow, or pasture ground only, or as woodlands, &c., shall be assessed in respect of the same in the proportion of one-fourth part only of the net annual value thereof. It was argued for the respondent that he was entitled by that provision to be rated in respect of his sporting right at one-fourth of the net annual value. The answer is that he is not an occupier of land used as arable, meadow, or pasture ground only, or as woodland; he is the statutory occupier, in the sense that the Act says he is to be rated as if he were the occupier, of a special hereditament—namely, the sporting right. We cannot, as we were invited to do, make him an occupier within the meaning of s. 211 of the Act of 1875.

I am therefore of opinion that the magistrates' decision was wrong, and that our judgment should be for the appellants.

WILLS J. I am of the same opinion. The use of the word "occupier" in s. 6, sub-s. 3, of the Rating Act, 1874, is clearly due to the fact that all rating is based upon occupation, and it was, therefore, thought necessary to apply the description of occupation to sporting rights, which were to be considered as "occupied" in order that the ordinary principles of rating might apply to them. But sporting rights only were to be considered as occupied. The sporting tenant was not made occupier of land used as arable, meadow, or pasture ground,

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or as woodlands, so as to make s. 211, sub-s. 1 (*b*), apply to him. He was made a statutory occupier for a particular purpose, not being, apart from the statute, an occupier of anything in the correct legal sense.

KENNEDY J. I agree.

Judgment for the appellants.

Solicitors for appellants: *Church, Adams & Prior, for C. & W. Trimmer, Alton.*

Solicitors for respondent: *Cunliffes & Davenport, for Bailey & White, Winchester.*

W. A.

C. A.

1904

March 4.

[IN THE COURT OF APPEAL.]

THE BOARD OF TRADE *v.* THE SAILING SHIP GLENPARK, LIMITED.

Shipping—Seamen—Shipwreck—"Distressed Seamen"—Expenses of Maintenance and Passage Home—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 190, 191, 193—*Merchant Shipping* (*Mercantile Marine Fund*) *Act*, 1898 (61 & 62 *Vict. c.* 44), *s.* 4.

A seaman was shipwrecked abroad, and was there paid his wages up to the time of the shipwreck. The amount so paid was more than sufficient to maintain him and to provide him with a passage home. He was maintained and provided with a passage home by one of the authorities referred to in s. 191 of the Merchant Shipping Act, 1894. In an action by the Board of Trade to recover the expenses so incurred, an account of those expenses was produced and proof of payment thereof by the Board of Trade was given:—

Held, that the question whether a seaman discharged or left behind or shipwrecked from any British ship, or from any of His Majesty's ships, is in distress in any place abroad, is a question of fact, and the receipt by him of wages sufficient to maintain him and pay his passage home does not necessarily shew that he was not a distressed seaman within s. 191 of the Act:

Held, also, without deciding whether the production of the account of the expenses and proof of payment thereof by or on behalf of the Board of Trade are, by s. 193, sub-s. 3, of the Act, made conclusive evidence that the expenses were incurred or repaid under the Act by or on behalf of the

Crown, that the Board, in the absence of evidence that the seaman was not a distressed seaman within the Act, were entitled to recover.

Decision of Bigham J., [1903] 2 K. B. 324, in favour of the plaintiffs, affirmed.

APPEAL from the judgment of Bigham J., reported [1903] 2 K. B. 324, upon the trial of the action without a jury.

The action was brought to recover from the defendants, as owners of the sailing ship *Glenpark*, moneys paid by the plaintiffs in respect of the maintenance and relief of certain seamen alleged to have been "distressed seamen" within the meaning of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60). (1)

The action was tried upon a statement of facts admitted by the parties.

The *Glenpark* was a British ship within the meaning of the Merchant Shipping Act, 1894, and the defendants were the

(1) By s. 190 of the Merchant Shipping Act, 1894, the Board of Trade may make regulations "with respect to the relief, maintenance, and sending home of seamen and apprentices found in distress abroad." By s. 191, certain prescribed "authorities," including Governors of British possessions, shall, in accordance with and on the conditions prescribed by the regulations, provide for the maintenance and sending home of seamen and apprentices (in the Act included in the term "distressed seamen") "who by reason of having been discharged or left behind abroad or shipwrecked from any British ship are in distress in any place abroad." By sub-s. 4, "the authority shall be paid in respect of the expenses of the maintenance and conveyance of distressed seamen such sums as the Board of Trade may allow, and those sums shall, on the production of the bills of disbursements, with the proper vouchers, be paid as hereinafter provided." By s. 193, as amended by s. 4 of the Merchant Shipping (Mercantile Marine Fund) Act, 1898, where any expenses on account of a "distressed seaman" are incurred by or on behalf of the Crown, those expenses shall be a charge upon the ship to which such distressed seaman belonged, and shall be a debt to the Crown from the master of the ship, or from the owner of the ship for the time being. By sub-s. 2 of s. 193, "the debt . . . . may be recovered by the Board of Trade on behalf of the Crown either by ordinary process of law, or in the Court and manner in which wages may be recovered by seamen"; and by sub-s. 3, "in any proceeding for such recovery the production of the account (if any) of the expenses furnished in accordance with this Act or the distressed seamen regulations, and proof of payment of the expenses by or on behalf of the Board of Trade, shall be sufficient evidence that the expenses were incurred or repaid under this Act by or on behalf of the Crown."

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registered owners. On February 1, 1901, whilst in the course of a voyage, she struck on a sunken rock near Wedge Island, in Spencer Gulf, South Australia, and became a total wreck. The crew, who lost the whole of their effects except the clothes they were wearing, were saved, and taken in the ship's boats to Port Victoria, in South Australia, arriving there on February 2. They were there maintained for two days by the Governor of South Australia, on behalf of the Crown acting by the Marine Board of South Australia (being one of the authorities referred to in s. 191 of the Merchant Shipping Act, 1894), and were then sent from Port Victoria to Port Adelaide, where they arrived on February 4, and were maintained at Port Adelaide by the same authority. On February 6 the representatives of the owners of the *Glenpark* paid each member of the crew the balance of wages due to him up to the time the ship was lost. Some of the crew, having failed to obtain employment at Port Adelaide, were provided by the same authority with passages to the United Kingdom. The amount expended by the authority was repaid to them by the plaintiffs as money due in respect of expenses incurred on account of distressed seamen within the meaning of s. 193 of the Merchant Shipping Act, 1894, and they claimed to recover the amount from the defendants under that section and s. 4 of the Merchant Shipping, &c., Act, 1898. The plaintiffs furnished an account of the expenses in accordance with the Merchant Shipping Act, 1894, and the distressed seamen regulations, and produced that account at the trial of the action and proved payment of the amount. The defendants, for the purposes of the present case, did not dispute liability as regarded expenses incurred in respect of any member of the crew whose wages up to the time the ship was lost were less than the amount expended by the authority upon his maintenance and conveyance, but disputed liability as to eleven members of the crew, the wages paid to whom were in each case more than the expenses so incurred. The expenses incurred in respect of those eleven seamen were claimed in the action.

The learned judge gave judgment for the plaintiffs. (1) The defendants appealed.

Danckwerts, K.C., and *Maurice Hill*, for the defendants. The expression "seaman" by s. 742 of the Act has a very wide meaning, including every one employed in any capacity on board any ship except a master pilot or apprentice, and it therefore includes presumably persons of good position. The learned judge held that any seaman wrecked and landed anywhere is a distressed seaman, whether he needs relief or not, but it is contended that to bring him within the class for whose benefit these provisions were intended he must not only be discharged, left behind, or shipwrecked, but destitute, which is the equivalent of "in distress." It cannot be said that a seaman who has money sufficient for his maintenance and passage home is destitute.

As to the production of the accounts and proof of payment under s. 193, the Act does not say that this shall be conclusive evidence that the payment was made in such a way that it must fall on the owners. The provision is that this shall be sufficient evidence of payment, and it was only intended to save unnecessary expense by determining the amount that has been paid. The provision does not prevent the owners from disputing their liability. In s. 310, which deals with evidence of a bond, a certificate of the execution of the bond is made conclusive evidence: shewing that where that result is intended it is stated plainly.

[They cited on this point *Nothard* v. *Pepper* (2), *Barraclough* v. *Greenhough* (3), and *Reg.* v. *Fordham*. (4)]

Sir R. B. Finlay, *A.-G.* (*Sir E. H. Carson*, *S.-G.*, and *H. Sutton* with him), for the plaintiffs. The seamen in this case were shipwrecked, and were distressed seamen at that time, which is the time that should be looked at. They lost all their effects, their right to further wages beyond those due up to the time of the shipwreck, and their passage home in the ship. It is said that a seaman can get his wages up to

(1) [1903] 2 K. B. 324.
(2) (1864) 17 C. B. (N.S.) 39.
(3) (1867) L. R. 2 Q. B. 612.
(4) (1873) L. R. 8 Q. B. 501.

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the time of shipwreck and pay all his expenses out of them, but this takes no account of his home expenses, and the allotment of his wages contemplated by s. 140 of the Act of 1894 and following sections. It would be a strange result of this legislation that if the wages paid to a seaman were insufficient by some small sum to pay for maintenance and passage home he would be distressed, and the owner would be liable, but that if the money was just enough to land him at a home port the owner would not be liable. If the wages were paid at home, on the return of the seaman, it has not been disputed that they would be payable in full, and the mere fact that they are paid abroad cannot affect the liability of the employers.

[He was stopped.]

Maurice Hill, in reply. The learned judge dealt with the question as a matter of law and not as one of fact. In effect he decided that whatever the resources of a shipwrecked seaman might be he was to be treated as in distress, and that is the question on which the defendants are desirous to have a decision.

COLLINS M.R. This is an appeal from a judgment of my brother Bigham, and the principal point raised is whether certain persons, under the circumstances admitted in a statement of facts agreed upon between the parties, were distressed seamen within the meaning of s. 191 of the Merchant Shipping Act, 1894. The point arises in this way: Certain sailors were shipwrecked off the coast of South Australia. They were taken in the first instance to Port Victoria and were then sent to Port Adelaide. They had lost their entire kit and everything except the clothes that they stood in. At Port Adelaide the agents of the owners of the ship paid each member of the crew the balance of wages due to him up to the time the ship was lost. It is not disputed that up to the time of payment the men were distressed seamen within the provisions of the Act; but it is said that after the payment to them of their wages at Port Adelaide they ceased to be distressed seamen and were not entitled to call on the authorities mentioned in s. 191 of the Act to provide them with maintenance and a

passage home. Under the same section seamen and apprentices to the sea service, whether subjects of Her Majesty or not, who by reason of having been shipwrecked from any British ship are in distress in any place abroad are among those who are classed as distressed seamen. It is said that these men, though they come within the description so given, were not in distress because each of them had received wages in excess of the amount required to maintain him and take him home. The question whether seamen are in distress or not seems to me to be a question of fact in each case. It is quite possible that a seaman who may have a family to support in England may be said to be in distress abroad, though he is paid his wages in a foreign place; but, on the other hand, on my reading of the Act, the fact that a seaman is shipwrecked is not conclusive evidence that he is a distressed seaman within the meaning of that term as used in the Act. A shipwrecked seaman might be a millionaire with plenty of money at his disposal, and in such a case he could hardly be called a distressed seaman who was entitled to maintenance and a passage home. The question, as I have stated, is one of fact in each case, turning upon such evidence as I have suggested. By s. 193, sub-s. 3, of the Act the production of the account of the expenses furnished in accordance with the Act or the regulations made under the Act, and proof of payment of those expenses by or on behalf of the Board of Trade, is to be sufficient evidence that the expenses were incurred or repaid under the Act by or on behalf of the Crown. Without expressing any opinion whether the production of the account and proof of payment is made conclusive evidence by that sub-section, it certainly is conclusive in the absence of any evidence to the contrary. In the present case there was no evidence to the contrary, and upon the evidence before the learned judge he was justified in saying that the seamen were distressed seamen. Upon the facts of this case I see no ground for interfering with the conclusion at which the learned judge arrived; but on the question whether the word "sufficient" is to be read as meaning "conclusive" I desire to reserve my opinion.

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ROMER L.J. In my opinion the question before us in this case is one of fact. A seaman is not necessarily within the description "distressed seaman" because he is shipwrecked. I should not call a seaman who had been shipwrecked and arrived at a foreign port with a sum of 500*l.* in his pocket a distressed seaman. On the other hand, I am not prepared to say that a seaman who has lost everything he possessed ceases to be a distressed seaman because he is paid wages sufficient in amount for his maintenance at the place at which he finds himself and for his passage home. He might be landed in his own country without a penny in his pocket to support himself or take him to his home, and with nothing to meet the expenses of maintaining his family. In the case before us there is, in my opinion, what the statute calls "sufficient evidence" that the expenses were incurred or repaid under the Act, and against that conclusion no evidence is produced for the purpose of displacing it. I therefore come to the conclusion as a matter of fact that the seamen were distressed seamen, and that the expenses incurred are recoverable from the defendants. Upon the question whether the production of the account and proof of payment of the expenses is conclusive evidence that they were incurred or repaid under the Act I give no opinion.

MATHEW L.J. It is not disputed that if the wages received by a shipwrecked seaman at a foreign port are short of the expenses that would be incurred for his maintenance and passage home he would be a distressed seaman within the meaning of the Act. The question in this case must be in my opinion one of fact. A seaman does not necessarily cease to be a distressed seaman because he receives money which would be sufficient to take him home. He may have other obligations to meet. The receipt of wages in this case cannot be treated as conclusive.

Without giving any opinion upon the question whether the production of accounts and proof of payment is conclusive evidence that the expenses have been incurred under the Act, there was in this case sufficient evidence to that effect, and

that evidence was unanswered. I agree, therefore, that the plaintiffs are entitled to succeed, and that the appeal must be dismissed.

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Appeal dismissed.

Solicitor for plaintiffs: *The Solicitor of the Board of Trade.*

Solicitors for defendants: *Rowcliffes, Rawle & Co., for Hill, Dickinson & Co., Liverpool.*

A. M.

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Copyhold—Arbitrary Fine—Custom to take smaller Fine on Admittance from Tenant of Manor than from Stranger—Colourable Purchase—Amount of reasonable Fine.

By the custom of a manor the purchaser of a copyhold tenement was required to pay to the lord on admittance a substantial arbitrary fine if he was a stranger to the manor, but only a nominal fine if he was already a tenant of the manor. A stranger, who was about to buy a copyhold tenement of considerable value, with the object of first becoming a tenant of the manor and thereby avoiding the payment of the larger fine, entered into an agreement with a third person for the sale to him of a cottage of small value in the manor on the terms that the vendor should after the expiration of three months repurchase it, and in the interval should receive the rent of it for his own use, and should pay all outgoings in connection with it. In pursuance of that agreement the cottage was surrendered, and the purchaser was admitted tenant, he paying a comparatively small arbitrary fine in respect of that admittance. The terms of the agreement were not disclosed to the lord. Subsequently the purchaser was admitted tenant of the larger tenement, and, as being already a tenant of the manor, was charged in respect of it only a nominal fine:—

Held, that the stipulation in the agreement for the sale of the cottage that the vendor should retain the rent and remain liable for the outgoings shewed that the purchase was merely colourable; that the admittance of the purchaser was consequently void; and that the lord was entitled to claim a substantial fine upon the admittance to the larger tenement:—

Semble, that the stipulation that the vendor should repurchase after a short interval was not enough to render the purchase merely colourable.

In manors in which such a custom as that above stated obtains the arbitrary fine which the lord is entitled to take from a stranger is not limited, in accordance with the general rule, to two years' improved value of the tenement; something more may be added on account of the fact

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that admittance will entitle the purchaser to be admitted to future purchases at a nominal fine; and for the purpose of determining how much it is reasonable to add on that account regard must be had to the value of the property, and to the consequent probability that it has been bought with the express object of getting the benefit of the custom on the future admittance to some other property which it is then intended to buy.

INFORMATION on behalf of the King as lord of the manor of Richmond praying that an alleged purchase and surrender of a cottage, copyhold of the manor, and the admittance of the surrenderee as tenant might be declared colourable and void as against the Crown.

By the custom of the manor of Richmond (otherwise West Sheene), as set out in a parliamentary survey made in the year 1649, "He that is a stranger and comes to be tenant of any copyhold lands belonging to the said manor is finable for the same at the will of the lord of the said manor as the first tenant, but never after he is once admitted to be a tenant doth he pay any arbitrable (1) fine for any other lands that he shall buy within the said manor. The fine certain paid by the copyhold tenants at the taking up of their estates or upon admittances to purchase among themselves is no more but two years' quit rent due for the same lands or tenements so to be taken up or bought." There were no records of the manor to shew the amount of the arbitrary fine customarily taken by the Crown on a purchase by a stranger before the year 1852. From that date to 1861 the amount of the arbitrary fine was fixed at two years' improved value of the tenement. And after 1861 it was raised to four years' improved value. Some time previously to July 22, 1902, the defendant Sandover, being desirous of purchasing and presenting to a charity a house in Richmond for use as a boys' club, entered into negotiations through the defendant Long, who was an estate agent in Richmond, for the purchase from one J. E. Billett of a house known as Ormonde Lodge at the price of 1725*l*. As the defendant Sandover was not at that time a tenant of the manor, the fine payable by him to the Crown on his admittance as tenant of Ormonde Lodge would, upon the assumption that

(1) I.e. arbitrary.

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the Crown was entitled to demand four years' improved value of the property, have been 400*l.*

It was the common practice in Richmond for strangers, who were desirous of purchasing a large property, to purchase and be admitted tenants of a smaller property first, so as to enable them to evade the payment of the larger fine. It was stated in evidence that the smaller property so purchased for this purpose sometimes consisted of an undivided share in a pump. Accordingly, with the object (inter alia) of avoiding the payment of the fine of 400*l.* on the purchase of Ormonde Lodge, the defendant Sandover entered into the following agreement in writing with the defendant Long:—

"July 22, 1902.

"To Mr. Walter J. Long.

"I hereby agree to purchase of you the copyhold cottage known as No. 11, Prospect Place, Red Lion Street, Richmond, Surrey, for the sum of 100*l.*, and to pay all expenses in connection with the transfer thereof to me, and I further agree to reconvey the same to you, at the expiration of three months from this date, for the sum of 75*l.*, and I agree to bear and pay all costs in connection with such transfer. The deeds of the cottage are to be handed to me, or my solicitors, tomorrow, July 23, 1902, and I empower you to collect and retain all rents received during such term as I may hold the said cottage, on which you shall pay all outgoings in connection therewith. William Sandover.

"And in case I wish to keep the property it is agreed I shall pay a further sum of 80*l.* William Sandover."

At the date of this agreement one Quinnell was in occupation of the cottage at a rental of 3*s.* 6*d.* a week. No notice of the agreement was given to Quinnell, nor was any notice of it given to the steward of the manor or any person on behalf of the Crown. On July 24, 1902, Sandover completed the purchase of Ormonde Lodge from Billett. On August 13, 1902, Long surrendered the cottage 11, Prospect Place, the memorandum of surrender stating that W. J. Long "did out of court in consideration of the sum of 100*l.* to the said W. J. Long paid by William Sandover . . . . surrender . . . . to the

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use of the said William Sandover, his heirs and assigns for ever"; and on the same day Sandover was admitted tenant thereof, and paid a fine of 32*l.* to the lord. Subsequently, on September 29, 1902, Billett surrendered Ormonde Lodge, and Sandover was admitted tenant thereof, paying a fine of 6*d.*, being two years' quit rent, on the ground that he was already a tenant of the manor. The Attorney-General filed the information on behalf of the Crown, praying that it might be declared that the alleged purchase by the defendant Sandover from the defendant Long of the cottage 11, Prospect Place, and the surrender and admittance of August 13, 1902, were colourable and void as against the Crown, that the defendant Sandover was not a tenant of the manor before his admittance to Ormonde Lodge, and that he be ordered to pay the sum of 400*l.*, less the said sums of 32*l.* and 6*d.*

Sir Robert Finlay, *A.-G.*, and *Vaughan Hawkins*, for the Crown. It is not disputed that the defendant Sandover was entitled to purchase a small tenement with the very object of enabling him to become a tenant of the manor and thereby escape the heavy fine upon the subsequent purchase of the larger tenement, but for that purpose the purchase of the small tenement must be a real purchase and not merely colourable: *Rex* v. *Boughey*. (1) Here there was no reality about the purchase of 11, Prospect Place; it was purely colourable, for by the terms of the agreement with Long the vendor was to retain the rents and also remain liable for the repairs. Then, if the transaction was only colourable, Sandover is liable for the fine payable by a stranger in respect of the admittance to Ormonde Lodge; for, as was observed by Bayley J. in *Rex* v. *Boughey* (2), if "the second purchase"—that is, of the smaller estate—"were fraudulent . . . . then, when the party applied for admittance to the larger estate the lord might demand the same fine that would have been payable if the second purchase had not been made, because fraud cannot assist the party committing it."

(1) (1823) 1 B. & C. 565; 25 R. R. 516; S.C. sub nom. *Rex* v. *Meer & Forton*, 2 D. & R. 824.

(2) 1 B. & C. at p. 573.

Then as to the amount of the arbitrary fine claimed by the Crown. An arbitrary fine means a reasonable fine, as opposed to one of a fixed amount: Scriven on Copyholds, 7th ed. p. 182. There is nothing to shew that a fine of four years' value is unreasonable in this particular manor. The general rule, no doubt, has long been that an arbitrary fine must not exceed two years' improved value of the land. But that rule does not apply where, as here, the fine is only exacted from strangers, and where the payment of it gives the purchaser exemption from the fine on a future purchase. In Watkins on Copyholds, 4th ed. p. 372, it is said: "In some manors a person only fines upon his first purchase; as if he purchase an acre of land, he shall pay a fine on his admission to it; but if he purchase fifty acres afterwards he shall pay no further fine. In such cases also the lord is not restrained to two or to seven years' value," citing a dictum of Dolben J. in *King* v. *Dillington*. (1)

Danckwerts, *K.C.*, and *Holman Gregory*, for the defendant Sandover. The transaction between Sandover and Long with respect to the purchase of 11, Prospect Place was perfectly genuine. Sandover had a real intention to become the owner of the cottage for a period of at least three months. On the one hand, the fact that there was a superadded agreement to resell to the vendor did not prevent the property from passing to Sandover. And on the other hand, it was perfectly consistent with his intention to become the owner that he should agree to allow Long to have the rents on the terms of his doing the repairs.

[CHANNELL J. At the most, did he become more than a trustee for Long, who retained the whole of the beneficial interest?]

Assume that he was a mere trustee, that could make no difference, for the lord is not bound to recognise trusts. If Long had in terms conveyed to Sandover in trust for himself, that would clearly have entitled Sandover to be admitted tenant, and when once he was so admitted he would enjoy all the benefits of being a tenant, for the custom as stated is that

(1) (1689) Freem. 494; S.C. sub nom. *King* v. *Dilliston*, 1 Show. 83.

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"after he is once admitted to be a tenant" he is not to be liable to pay arbitrary fines on future purchases; it does not require that the tenant shall also be equitably entitled. The important thing is the surrender; the purpose for which the surrender is made is immaterial. If a surrender is in fact tendered to the lord, he has no right to inquire into the private arrangements between the parties or whether there has been any consideration for the surrender, but is bound to admit the surrenderee. "All the lord has a right to require is to have a tenant": per Cur. *Rex* v. *Hendon*. (1) It is true that in *Rex* v. *Boughey* (2) Bayley J. said that if the purchase be merely "colourable" the admittance can be treated as void; but that was only an obiter dictum; the Court decided in favour of the purchaser. When once it is conceded that the lord is bound to admit a trustee, and that the acquisition of any beneficial interest by the surrenderee is unnecessary, it is difficult to attach any meaning to the term "colourable" as applied to such a transaction as the present. The lord was not here misled in any way by the non-disclosure of the agreement of July 22, 1902, for even if the lord had had full notice of the terms of it he would still have been bound to admit Sandover as tenant of 11, Prospect Place.

With regard to the amount of the fine, it is in terms expressed to be at the will of the lord. That renders the custom bad. In *Douglas* v. *Earl Dysart* (3) it was held that a custom that the lord in assessing the fine upon admittance of one not already a tenant on the court rolls is not restricted in amount to any number of years' value of the tenement is unreasonable. To be reasonable the fine should not exceed two years' value as a maximum.

Cave, K.C., and *Gilbert Smith*, for the defendant Long. There is nothing in the custom as stated with respect to the necessity of any purchase and sale at all before surrender. The lord is bound to admit any person coming with a surrender, and here there was a formal surrender. "The lord has nothing to do with the equitable title, but is only concerned to

(1) (1788) 2 T. R. 484; 1 R. R. 527. (2) 1 B. & C. 565; 25 R. R. 516.
(3) (1861) 10 C. B. (N.S.) 688.

see who is entitled to be on the rolls as tenant, and what fine or fines ought to be paid": per Cotton L.J., *Hall* v. *Bromley*. (1)

Sir Robert Finlay, *A.-G.*, in reply. The case of *Rex* v. *Boughey* (2) is a distinct authority that the lord in this case would not have been bound to admit if he had known the true facts, and that although he has in fact admitted, he is entitled to have the admittance declared void. Upon the question of the amount of the fine claimed, the case of *Douglas* v. *Earl Dysart* (3) is not an authority against the Crown. That case, which was decided upon a special case stated by a copyhold commissioner, turned upon the peculiar form in which the question was left to the Court. Vaughan Williams J. there said: "If the question had assumed another shape, viz., whether the custom may be good, if the amount be reasonable but fixed without reference to the ordinary rule of two years' limitation, the point might be arguable."

CHANNELL J. In this case I think I must find for the Crown. It seems to me perfectly clear that the transaction was colourable; I think that is the best word to adopt, because I am satisfied that there was nothing morally fraudulent about it. No doubt any purchaser has a right to evade this custom—that is to say, so to manage his purchase as not to come within it, and not to subject himself to the larger fine. It was to my mind perfectly legitimate for Sandover to purchase the cottage from Long with an understanding that, if desired, Long should purchase it back again. The transaction would then have passed the property in the cottage to Sandover, and the rents and profits of it and the liability to repair it would have been his; and it would have been immaterial that he wanted to become the owner for the purpose of getting on the court roll as a tenant, and of getting thereby the advantage of being able to get on the roll in respect of another property for a less fine than he would have to pay if he were not a tenant. But the transaction, in order to entitle him to that advantage,

(1) (1887) 35 Ch. D. 642, at p. 652. (2) 1 B. & C. 565; 25 R. R. 516.
(3) 10 C. B. (N.S.) 688.

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Channell J.

must be a genuine transaction, and if he merely pretends to purchase the property when there is no intention that the property shall pass, he does not become entitled to go upon the roll of the manor as a tenant. And if, notwithstanding that the transaction is colourable, he is in fact admitted, then inasmuch as the admittance was procured for the express purpose of escaping payment of the larger fine, the lord is entitled to treat him as not having acquired any rights under the admittance. That proposition is supported by the authority of *Rex* v. *Boughey* (1), and also appears to me to be in accordance with ordinary principles.

Whether if the tenant of a copyhold were to surrender his tenement in favour of a person who had not acquired any beneficial interest, and whom it was desired to put on the court roll merely as a trustee for the surrenderor, the lord would be compellable to admit the surrenderee, is a question that I need not here decide. In all probability, if the surrender were not made for the purpose of depriving the lord of a fine, the lord would be bound to admit him; but if it were shewn that the object was to affect the lord's right to a fine, I think it is clear that he would be entitled to refuse admittance.

The reason why I think the transaction in this case was colourable was, not that there was an agreement by the vendor to repurchase, but that the supposed purchaser was not to have the rents and profits of the property that he purchased, and was not to be liable for the outgoings. Those were both to remain with the vendor. That seems to me to shew clearly that the property never passed, and that it was a purchase only in name.

With regard to the evidence as to intending purchasers of tenements in this manor making a preliminary purchase of a share in a pump, I can only say that I think that either there must be some mistake about the fact, or else the explanation is that it cannot have been found out. If the parties only purported to buy a share in the pump and never did in fact buy a share in it, then the transaction would have been the same

(1) 1 B. & C. 565; 25 R. R. 516.

as the present, and, if it had been contested, would have met with the same result.

Then as to the remedy. I think the lord is entitled to be put in the same position as he would have been in if he had never admitted the tenant, that is to say he is entitled to a reasonable fine on the admittance to Ormonde Lodge. I cannot accept the view that because in the custom the amount of the fine is stated to be at the will of the lord, therefore the custom is bad. It means nothing more than that it is to be an uncertain fine, but that the amount must still be reasonable. Upon the question of what is a reasonable amount, it has long been established by the Courts that as a general rule the fine must not exceed two years' improved value. But there is authority for saying that there is an exception to that general rule in a case in which, as here, the admittance purchases a special right to be admitted to any other property thereafter purchased at an almost nominal fine. In such a case it is only reasonable that on account of this special advantage something should be added to the two years' value which constitutes the maximum fine in manors in which this custom does not obtain. Then how much should be added on this account? In considering that question, I think that regard should be had both to the value of the property to which admittance is sought, and also to the question whether there is any reason to think that the property has been bought for the purpose of getting admittance to other property at a future date. For instance, if it were a question of what would be reasonable for he admittance to the small cottage in Prospect Place, I think I should be much inclined to go the length of the seven years which Dolben J. was of opinion would have been a reasonable fine in a case cited by Watkins. (1) But I am not so sure that where the party is purchasing a substantial property as to which there is no suspicion that it is being bought for the purpose of being able to buy other property at a cheaper rate, the mere fact that the admittance would confer the power of doing so would be sufficient to justify the lord in assessing the fine at four years' value. It seems to me that to double the ordinary

(1) *King* v. *Dillington*, Freem. 494; 1 Show. 83.

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maximum fine where the property is of a substantial value would be going too far. In this case I think it would be reasonable to fix the fine at three years' value—that is to say, 300*l.*

Judgment for the Crown.

Solicitor for the Crown: *Solicitor of Office of Woods and Forests.*

Solicitors for defendant Sandover: *Trinder, Capron & Co.*

Solicitors for defendant Long: *Skewes-Cox, Nash & Co.*

J. F. C.

C. A.

1904

March 11.

[IN THE COURT OF APPEAL.]

HARMAN *v.* AINSLIE.

Landlord and Tenant—Lease—Negative Covenant—Covenant not to assign or sublet—Covenant to be "performed"—Proviso for Re-entry.

A lease of a house contained covenants by the lessee to pay the rent, rates, and taxes, to repair, and not to assign or underlet the premises without the lessor's consent: and it contained a proviso that "if the lessee shall commit any breach of the covenants hereinbefore contained, and on his part to be performed, then the said lessor may re-enter upon the said premises":—

Held, reversing the judgment of Wright J., that the proviso for re-entry applied to a breach of the covenant not to assign or underlet the premises without the consent of the lessor.

APPEAL against the judgment of Wright J. in an action tried before him without a jury. (1)

The action was for the recovery of possession of a house, shop, and premises by the assignee of the reversion upon a lease of them against the assignee of the lease as upon a forfeiture.

The indenture of lease, which was dated July 8, 1885, witnessed that, in consideration of the rent and covenants thereinafter reserved and contained on the part of the lessee to be paid, observed, and performed, the lessor thereby demised the premises to the lessee for a term of twenty-one years at the yearly rent of 60*l.* The lease contained covenants by the

(1) [1903] 2 K. B. 241.

lessee to pay the rent, rates, and taxes, and to repair and keep in repair the premises, and that the said lessee would not during the term use or suffer the premises or any part thereof to be used for any art, trade, or business whatsoever excepting the trade of an outfitter without the licence or consent in writing of the lessor; also a covenant that "the said lessee shall not, nor will during the term hereby granted, assign, underlet, or part with the possession of the said premises or any part thereof, or do or commit any act or thing whereby, or by means whereof, the said premises or any part thereof may be assigned, or otherwise disposed of, or the possession thereof parted with, to any person or persons whomsoever for the whole or any part of the said term (except the letting part of the said messuage or dwelling-house as offices or lodgings) without the consent in writing of the said lessor first had and obtained for that purpose, such consent, however, not to be unreasonably withheld in the case of a proposed assignment to a respectable and responsible person"; and a covenant that the lessee would at the expiration or sooner determination of the said term deliver up to the said lessor the said premises, and all fixtures and additions thereto, in such good and substantial repair and condition as should be consistent with the due performance of the several covenants thereinbefore contained. The lease contained a proviso for re-entry in the following terms: "Provided always that, if the said yearly rent of 60*l.* or any part thereof shall be unpaid for the space of forty-two days, whether the same shall have been legally demanded or not, or if the said lessee shall commit any breach of the covenants hereinbefore contained and on his part to be performed, then and in either of the said cases the said lessor may re-enter upon the said premises or any part thereof in the name of the whole, and immediately thereupon this demise shall absolutely determine." The lessor covenanted with the lessee that, the lessee paying the said rent and observing and performing all the covenants thereinbefore contained, should and might peaceably and quietly hold and enjoy the said premises during the said term without any interruption or disturbance whatsoever of, from, or by the said lessor or any

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other person or persons rightfully claiming under her or them.

The lease had been assigned with the assent of the lessor to one Comber, and had become vested in the defendant. The plaintiff had purchased the reversion on the lease from the lessor. The plaintiff alleged that there had been a breach by the defendant of the covenant not to suffer the premises to be used for any business other than that of an outfitter without the consent of the lessor, and also a breach of the covenant not to underlet without the consent of the lessor. Wright J. held that there had not been a breach of the first-mentioned covenant, and the contention that there had been such a breach was not pressed in the Court of Appeal. The defendant had underlet the premises without the lessor's consent; but the learned judge held with regard to both the alleged breaches of covenant that, the lease containing both affirmative and negative covenants, a proviso for re-entry in the above form must be construed as applying only to breaches of the former, and therefore he gave judgment for the defendant.

Younger, K.C., and *J. Samuel Green*, for the plaintiff. The plaintiff is entitled to succeed on the ground of forfeiture for breach of the covenant not to assign or sublet without the consent of the lessor. There is no actual decision that the word "performed" in a condition of re-entry like this will not apply to a negative covenant. There are dicta both ways, but those in favour of the construction contended for by the plaintiff preponderate. *Doe* v. *Marchetti* (1) is not a decision on the point. In that case the proviso for re-entry was for default in performance of the covenants after the space of thirty days' notice. It is obvious that such a proviso could not be applicable to a negative covenant. The dicta of the judges, particularly of Martin B., in delivering their opinions in the House of Lords in *Croft* v. *Lumley* (2) are in favour of the view that the word "perform" is applicable to a negative covenant. It is true that the words "observed and kept" were also contained in the condition in that case, and no doubt

(1) (1831) 1 B. & Ad. 715; 35 R. R. 420. (2) (1858) 6 H. L. C. 672.

Bramwell B. expressly referred to them, but he indicated no dissent from the dictum of Martin B., which clearly points to the conclusion that the word "perform" alone would have had the same effect. In *West* v. *Dobb* (1) Kelly C.B. and Channell B. seem to have thought that the clause of re-entry did not apply to a negative covenant, although the word "observance" was contained in it as well as "performance"; but this view seems to be contrary to all the other cases. In the judgment in *Hyde* v. *Warden* (2), which was prepared by Amphlett L.J. and read by Brett L.J., there is a dictum which is unfavourable to the plaintiff; but in the case of *Barrow* v. *Isaacs* (3) the latter Lord Justice, then Lord Esher M.R, expressed an opinion that the word "perform" would apply to a negative covenant, and in that case there is a strong dictum to that effect by Kay L.J. The observations of Fry L.J. in *Evans* v. *Davis* (4) hardly amount to an expression of opinion on the subject. He merely says in effect that, if it had been necessary to decide the point, he might have felt himself bound by a dictum of Lord Coke. Both Martin B. in *Croft* v. *Lumley* (5), and Kay L.J. in *Barrow* v. *Isaacs* (3), point out that, though a covenant be negative, i.e., not to do a thing, the word "performance" may well apply to the obligation or duty under it, and that the covenantor may be said to perform his obligation by abstaining from doing the thing which he has covenanted not to do.

On the construction of this lease taken as a whole, it appears that the expressions "observe" and "perform" are really used interchangeably. The words "and on his part to be performed" appear to have been added to shew that the lessee's covenants are referred to, and in truth make no difference in the sense. Again, the covenant not to assign or underlet without the lessor's consent, though in one sense negative, is not wholly so; it has an affirmative side, namely, as a covenant to procure the lessor's assent before assigning, and in that sense is capable of being performed, on the strictest construction

(1) (1870) L. R. 5 Q. B. 460.
(2) (1877) 3 Ex. D. 72.
(3) [1891] 1 Q. B. 417.
(4) (1878) 10 Ch. D. 747, at p. 761.
(5) 6 H. L. C. 672.

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of the term. For this purpose the substance and not the form of the covenant must be regarded: *Duke of St. Albans* v. *Ellis* (1); *Clegg* v. *Hands* (2); *Metropolitan Electric Supply Co.* v. *Ginder* (3); *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.* (4); *Mason* v. *Corder.* (5)

[They also cited *Timms* v. *Baker.* (6)]

Hume Williams, K.C., and *R. J. N. Neville*, for the defendant. It is clear upon the authorities that a forfeiture clause must be construed strictly. There is no case in which the word "performed" in such a clause has been held to apply to a negative covenant; and *Doe* v. *Marchetti* (7), *Doe* v. *Godwin* (8), and *Doe* v. *Stevens* (9), are authorities to shew that it cannot so apply. It is clear that the dictum of Bramwell B. in *Croft* v. *Lumley* (10) is based on the fact that the proviso there contained the words "observed and kept," as was also the case in *Barrow* v. *Isaacs.* (11) From *Croft* v. *Lumley* (10) down to *Barrow* v. *Isaacs* (11) all the dicta were in favour of the defendant's contention. There were the dicta of Kelly C.B. and Channell B. in *West* v. *Dobb* (12), and of the Court of Appeal in *Hyde* v. *Warden.* (13) In *Evans* v. *Davis* (14) the observations of Fry J. make it clear that, if it had been necessary to decide the point, he would have decided it in favour of the defendant's contention. The point does not appear to have been really much discussed in *Barrow* v. *Isaacs.* (11) The word "perform" has essentially an active meaning, and is inapplicable to a negative covenant. A negative cannot be performed: Co. Litt. 303 b. The covenant not to assign or sublet without the lessor's consent is essentially a negative covenant. The fact that there is a provision for the withdrawal of the prohibition against assignment or subletting

(1) (1812) 16 East, 352; 14 R. R. 361.
(2) (1890) 44 Ch. D. 503, at p. 522.
(3) [1901] 2 Ch. 799, at p. 806.
(4) [1901] 2 Ch. 37.
(5) (1816) 7 Taunt. 9; 17 R. R. 427.
(6) (1883) 49 L. T. 106.
(7) 1 B. & Ad. 715; 35 R. R. 420.
(8) (1815) 4 M. & S. 265; 16 R. R. 463.
(9) (1832) 3 B. & Ad. 299; 37 R. R. 429.
(10) 6 H. L. C. 672.
(11) [1891] 1 Q. B. 417.
(12) L. R. 5 Q. B. 460.
(13) 3 Ex. D. 72.
(14) 10 Ch. D. 747.

cannot convert the obligation which is negative into an affirmative one. It is merely a qualification of the negative covenant. The fact that in some parts of the lease, such as the covenant for quiet enjoyment, the expression "observe" is used as well as "perform," points to the inference that, in the condition for re-entry, the word "performed" was used advisedly alone, the intention being to exclude negative covenants. If the words "and on his part to be performed" are construed as merely equivalent to the "lessee's covenants," they have no meaning, for the effect would have been precisely the same if the proviso had ended at the word "contained." It is a general rule of construction that some effect ought to be given if possible to all the words of an instrument.

Younger, *K.C.*, in reply. If the proviso for re-entry does not apply to a breach of a covenant not to assign or underlet, the lessor has no effective remedy for a breach of such a covenant. An injunction could not be obtained, if an assignment had already taken place, and an action for damages would not be a satisfactory remedy.

COLLINS M.R. The question raised in this case is whether the assignee of the reversion upon a lease is entitled to recover the demised premises from an assignee of the term as upon a forfeiture by reason of breaches of two covenants, one being a covenant not to use the premises for any business except that of an outfitter, and the other a covenant not to assign or underlet, without the consent of the lessor. With regard to the alleged breach of the first of these covenants, the learned judge in the Court below held that, though the defendant had in fact suffered part of the premises to be used for a business other than that of an outfitter, yet, by reason of a licence given to the defendant's predecessor in title, that user did not constitute a breach of covenant. The plaintiff's counsel, without admitting that the learned judge's view as to this was correct, was content not to urge that point, but to confine his argument to the point that there had been a forfeiture by reason of the breach of the covenant not to assign or underlet without the lessor's consent. The main point discussed, and upon which

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the case was decided in the Court below, was whether the proviso for re-entry could be held to be applicable to a negative covenant. This question depends on the terms of the proviso read together with the other terms of the lease. It was held by Wright J. that, the words of the proviso being "if the said lessee shall commit any breach of the covenants hereinbefore contained, and on his part to be performed, then . . . . the said lessor may re-enter upon the said premises," those words made it impossible to give effect to the proviso where the breach was of a negative covenant, like that against assignment or underletting, because the word "performed" was inapplicable to such a covenant. The notion upon which the learned judge's ruling is founded goes back very far, the root of it being apparently a statement in Co. Litt. 303 b, which is referred to in a note to *Doe* v. *Marchetti* (1), and which is as follows: "A man is bound to perform all the covenants in an indenture; if all the covenants be in the affirmative, he may generally plead performance of all; but, if any be in the negative, to so many he must plead specially, for a negative cannot be performed." That is the basis of the supposed rule, which, however, so far as I am aware, has never been the subject of an express decision, but only of various dicta. The authorities have been fully discussed in the course of the argument, and, in my opinion, none of them amounts to a decision of the point, certainly not to a decision in favour of the view contended for by the defendant. The original dictum of Lord Coke is no doubt by a very high authority, but it is in terms limited to the mode of alleging performance of covenants in pleading. He says that a man is bound to "perform" all his covenants, but in pleading he must plead specially with regard to negative covenants; and it is worthy of observation that in that very sentence he uses the word "perform" in the general sense of giving effect to the obligation created by a covenant, whether affirmative or negative. The difficulty in these cases appears to me to have arisen from a confusion of the obligation accepted with the mode of performing it. When one speaks of "performing" a covenant, it is in the sense of

(1) 1 B. & Ad. 715; 35 R. R. 420.

fulfilling the duty created by it, whether to do or to abstain from doing a thing. The word "perform" is, no doubt, inapplicable to not doing a thing, but the obligation to abstain from doing something may, I think, be said to be "performed" by not doing it. If a man promises not to do a thing he fulfils his obligation, or, in other words, "performs" his contract, if he abstains from doing it. It seems to me that it is in this sense that the word "perform" was used in several of the provisoes for re-entry which have been discussed, and also in the present case. I think "perform" means in this context "carry out the obligation undertaken," whether negative or affirmative. At a time when the rules of pleading were very technical and strict, it was laid down by Lord Coke, as a rule of pleading, that performance of negative covenants must be pleaded specially, and that rule seems to be the basis of some of the dicta on this subject; but, after going through all the authorities, it does not appear to me ever to have been decided that it must be applied to the construction of a condition of re-entry like that in this lease.

The case that was relied on by the defendant's counsel as the nearest approach to a decision on the subject was that of *Doe* v. *Marchetti*. (1) It was there held that a proviso in a lease, giving a power of re-entry, if the tenant should make default in performance of any of the clauses by the space of thirty days after notice, did not apply to a breach of a covenant not to allow alterations in the premises, or to permit new buildings to be erected thereon without permission. The pith of the decision is contained in a passage in the judgment of Lord Tenterden C.J., where he says: "It cannot be supposed that the parties anticipated a thirty days' notice being given not to raise the walls or vary from the original plan of the premises, or not to suffer buildings to be erected, or windows or openings to be made. It is quite different where the notice required is to do some such act as repairing, or paying money: there a stipulation for notice is reasonably introduced, and is evidently for the benefit of the lessee. Taking the whole clause of re-entry together, I think the introduction of these

(1) 1 B. & Ad. 715; 35 R. R. 420.

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words "by the space of thirty days next after notice" confines it to those covenants which are to be performed by the lessee, and, which not being performed, he incurs a forfeiture." The reason for the decision was the impossibility of applying the provision for thirty days' notice in the proviso to negative covenants. That is obviously not a decision which is in point in the present case, where there is no such provision in the proviso for re-entry. That being the nearest approach to a decision on the point, and having already examined the dictum upon which the supposed rule rests, and stated the qualification which appears to me to be inherent in it, I do not propose to deal with the various subsequent dicta on the subject in great detail. There are some in favour of the plaintiff, and some in favour of the defendant, but it seems to me that, previously to the last, and perhaps the strongest of them, namely, the dictum of Kay L.J. in *Barrow* v. *Isaacs* (1), they were about as favourable to one side as to the other.

In *Croft* v. *Lumley* (2) there was a proviso for re-entry on demised premises, if the lessee should make default of or in the performance of the covenants of the lease to be by him performed, observed, and kept; and the question was raised whether that proviso applied to negative covenants. All the judges who advised the House of Lords appear to have thought that, if there had been a breach of such a covenant, the proviso for re-entry would apply. Martin B. pointed out in the strongest possible terms that there may be non-performance of a negative covenant; that it is the duty imposed by the covenant which is to be performed, and is not performed, as much by doing something which a man has undertaken not to do, as by not doing something which he has undertaken to do. The learned judge said (3): "I do not myself consider there is any inaccuracy in language in saying that a man has performed his covenant, when he has not done what he covenanted not to do, or that he made default in performing his covenant when he has done it. The abiding by a covenant is a performance of it; the non-abiding a non-performance." The defendant's counsel

(1) [1891] 1 Q. B. 417.

(2) 6 H. L. C. 672.

(3) 6 H. L. C. at p. 719.

relied on what was said by Bramwell B. in the same case, but his observations do not appear to me to tell in the defendant's favour. He said (1): "I think that default of or in performance of all covenants to be performed, *observed*, and *kept*, applies to covenants not to do something, as well as to covenants to do something." No doubt he lays stress on the fact that the proviso in that case contained the words "observed and kept"; but we all know that, in deciding a point, judges do not decide more than is necessary, and, those words being contained in the proviso, he emphasizes them as making it clearer that there might be a breach by non-performance of the negative covenant; but it does not follow that what he said is any authority that the construction of the proviso would not have been the same if only the word "performed" had been used. What he said does not involve any dissent from the view taken by Martin B. I do not think it is necessary to refer particularly to what was said by the other judges in that case; but, as I have observed, they were all unanimous in holding that, if there had been a breach of the negative covenant, the proviso for re-entry would apply. Dealing shortly with the current of the authorities on the subject, in *West* v. *Dobb* (2) there are dicta by Kelly C.B. and Channell B., which no doubt are favourable to the defendant, because, the proviso there being for re-entry, if the lessees should fail in the observance or performance of any of their covenants, they go somewhat beyond any other authority, and express an opinion that the same limitation would apply to the word "observance" as to the word "performance," and neither would apply to a negative covenant. Then we come to the case of *Hyde* v. *Warden* (3), in which Brett L.J. read a judgment which had been prepared by Amphlett L.J., and from which it would appear that, if it had been then necessary to decide the point, he was prepared to hold that the word "perform" in a proviso for re-entry could not apply to a negative covenant. But that dictum, so far as it can be considered the dictum of Brett L.J., is contrary to the view which he expressed at a later date, when presiding

(1) 6 H. L. C. at p. 705. (2) L. R. 5 Q. B. 460.
(3) 3 Ex. D. 72.

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in the Court of Appeal in *Barrow* v. *Isaacs* (1), and delivering his own opinion. Then we come to *Evans* v. *Davis* (2), where Fry J. is said to have expressed an opinion that the word "non-performance" is not applicable to negative covenants. It was not necessary to decide the point, and what the learned judge said was that, if it had been, he probably might have felt himself bound to hold that Lord Coke was right in the dictum to which I have before referred. I do not gather from what Fry J. said that the inclination of his own mind was in that direction, but that, sitting as a judge of first instance, he might have felt bound by that dictum.

Passing over any other authorities, we come to what appears to me the most important authority on the subject in modern times, namely, the case of *Barrow* v. *Isaacs*. (1) In that case we have dicta by Lord Esher M.R. and Kay L.J. on the point. Lord Esher M.R. said with regard to the argument in that case that the condition for re-entry did not apply: "But I think that proposition is disposed of, because the word 'observe' as well as 'perform' has been put in the stipulation, though I doubt whether it was necessary to put that word in." Kay L.J. said: "Another point was made that the proviso for re-entry refers only to the breach of affirmative and not of negative covenants. This is founded on certain obiter dicta in *Hyde* v. *Warden*. (3) Speaking for myself, I should think that an extremely narrow construction, if the word 'perform' only had been used. 'Perform' has not necessarily an active meaning. We say that a man performs his duty by not answering revilings, by being silent when he ought not to speak, and by many other abstentions from acting as well as by active proceedings." These are strong observations, coming from a judge as familiar as was the learned Lord Justice with the branch of the law which he was discussing.

I am not for a moment saying that the meaning of the word "perform" in such a proviso can be discussed as an abstract question. In this, as in other cases of the construction of a document, we have to collect the intention of the parties

(1) [1891] 1 Q. B. 417. (2) 10 Ch. D. 747.
(3) 3 Ex. D. 72.

from the terms of the document as a whole. I do not say that in certain collocations the meaning of the word might not be limited by reference to the context, as in *Doe* v. *Marchetti* (1), where it was found impossible to treat the word "perform" as applicable to a negative covenant by reason of the provision as to thirty days' notice. Subject to this consideration, the authorities appear to me to leave it open to us to take our own view of the meaning of the proviso before us. I think the construction contended for by the plaintiff is the correct one, for the reasons given by Martin B. and Kay L.J., which not only commend themselves to one's common sense, but appear to me to shew that, even upon a subtle analysis of the language used, it is a more accurate construction of the words than that contended for by the defendant. In a proviso for re-entry for non-performance of covenants, it seems to me that the word "perform" is used as meaning the fulfilment of the obligation or duty undertaken, and not as referring to the thing to be done or left undone in pursuance of the covenant; and that a negative covenant may be said to be performed by a man's not doing the thing which he has promised not to do, as an affirmative covenant is by his doing what he has promised to do. Therefore, in absolute strictness, if it is a question of going into the niceties of language, I think the words of this proviso for re-entry are appropriate to the breach of a negative covenant. With reference to some of the earlier dicta on the subject, it may be observed that, when the refined distinction upon which the defendant relies was first introduced, there was a natural inclination on the part of the Courts to avoid holding that there was a forfeiture. The law with regard to relief against forfeitures was not developed as in more modern times. There is not, now that the Legislature has carefully considered and provided for the various cases in which they think relief ought to be given against forfeiture, the same reason as there once was, for not construing provisoes for re-entry according to the fair grammatical meaning of the words used. It does not, I think, affect this consideration that, in the particular case of the breach of a

(1) 1 B. & Ad. 715; 35 R. R. 420.

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covenant not to assign or sublet, the Legislature have not provided for giving relief to a lessee against a forfeiture. It is none the less the case that the reasons which gave rise to the strict mode of construction applied to forfeiture clauses in general in former times no longer exist. The result of the authorities appears to me to be that we are left with the right to exercise our own judgment on the construction of the proviso for re-entry in this case, and that the last and most authoritative pronouncement by two judges of this Court is in favour of the view contended for by the plaintiff. That being so, there appears to me to be nothing in the terms of the particular lease in this case to prevent us from giving to the word "performed" in the proviso for re-entry that meaning which primâ facie I should be disposed to give to it. I rather gather that Wright J. would have been disposed to take the same view of its meaning, but that he thought himself bound by preponderating authorities to the contrary. For these reasons I think that the appeal must be allowed.

ROMER L.J. I am of the same opinion. It may be admitted that the word "perform" may, in ordinary cases, be said to be more specially appropriate to positive covenants. But it cannot, I think, be laid down, as a hard and fast rule, that it is inappropriate, when applied at any rate to some negative covenants. I agree with the Master of the Rolls that, speaking broadly, it may properly be said, as Martin B. said in *Croft* v. *Lumley* (1), that there is not "any inaccuracy in language in saying that a man has performed his covenant, when he has not done what he covenanted not to do, or that he made default in performing his covenant, when he has done it." After what the Master of the Rolls has said, I do not intend to go through the various cases on the subject and the dicta contained in them. All I need say is that the result of them appears to me to be that we are not bound to hold, and that it would not be right to hold, as a general rule of construction, that, in clauses of re-entry, the word "perform" must be construed as excluding all covenants by the lessee which may be called negative

(1) 6 H. L. C. 672.

covenants. It may well be that, in the construction of particular clauses of re-entry, there may be some terms in the clause or its context, such as to prevent the application of the word "perform" to some negative covenants; but, after all, the question, whether in a clause of re-entry in a lease the word "perform" applies to a negative covenant, must depend on the true construction of the lease taken as a whole. Here I think the words "to be performed" do include the previous covenants in the lease, which have been called negative covenants. What are those covenants? One of them is a covenant not to use the premises, or suffer them to be used, for any other business than that of an outfitter without the consent of the lessor; and the other is a covenant not to assign or underlet the premises without the consent of the lessor. These two covenants have no doubt been put in a negative form, so far as words are concerned; but it may be observed that, as a matter of substance, they may be regarded as, at any rate, only partly negative. The covenant against carrying on any business upon the premises but that of an outfitter, without the consent of the lessor, might be put in an affirmative form, namely, that of a covenant by the lessee that he would apply for, and obtain, the consent of the lessor, before carrying on any other business on the premises; the covenant not to assign or underlet, without the consent of the lessor, might also be put in an affirmative form, namely, that of a covenant to obtain the consent of the lessor, before assigning or underletting the premises. Bearing in mind the nature of the only two negative covenants in the lease, I think the words "to be performed" in the condition of re-entry are not inappropriate to, and ought to be held to include, those covenants. It is very difficult to suppose that the clause of re-entry was not intended to apply to the covenant not to assign or underlet without the consent of the lessor. That covenant, the breach of which has been regarded as so serious that, neither under the ordinary doctrine of the Court of Chancery as to forfeitures, nor under the Conveyancing Acts, is there any power to relieve against a forfeiture incurred by a lessee through such a breach, would for all practical purposes

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be useless, if the condition for re-entry did not apply to it. It is unnecessary to labour this point, but it will be obvious that this is so to any one who considers what remedies a lessor could possibly have other than re-entry, if a lessee had already assigned or underlet. For these reasons I come to the conclusion that the appeal should be allowed.

MATHEW L.J. I agree, and I have very little to add to the reasons given by the Master of the Rolls and Romer L.J., with which I entirely concur. We have to construe the particular lease in this case, and not any other; and I am satisfied that the true meaning of it is that the word "performed" was intended to apply to the negative as well as to the positive covenants in the lease. It is difficult to define a negative covenant, for it is clear that many so-called negative covenants readily assume a positive and affirmative aspect for some purposes. The covenant not to assign or underlet may be looked at as a covenant to retain possession of the premises, and as such be treated as affirmative. I do not think that it would be a reasonable construction of the proviso for re-entry to construe it as not applying to such a covenant. That covenant is often one of the greatest importance to a lessor; and, if the construction contended for by the defendant were correct, it would be in effect nugatory, and would afford no protection to the lessor; for an action for damages on the covenant would be a wholly unsatisfactory remedy. I am satisfied that the true construction of this proviso in this lease is that it gives a right of re-entry for breach of the covenant not to assign or sublet the premises without the lessor's consent.

Appeal allowed. (1)

Solicitors for plaintiff: *Leslie, Antill & Arnold.*
Solicitor for defendant: *C. E. Soames.*

(1) The case was sent down for a new trial in relation to a point other than the construction of the proviso for re-entry, namely, as to whether there had on the facts been a waiver of the breach of covenant; but there was nothing in that point which called for a report.

E. L.

[IN THE COURT OF APPEAL.]

C. A. 1904 March 9.

FRANK WARR & CO., LIMITED *v.* LONDON COUNTY COUNCIL.

Lands Clauses Acts—Compensation—Compulsory Sale of Land—Interest in Land—Right to supply Refreshments in a Theatre—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 68.

By a contract made between the lessees of a theatre and the plaintiffs, it was agreed that the plaintiffs should have the exclusive right for a term of years to supply refreshments in the theatre, and for that purpose should have the necessary use of the refreshment rooms, bars, and wine cellars of the theatre, and that they should have an exclusive right to advertise, and let spaces for advertisements, in certain parts of the theatre:—

Held, that the contract did not confer on the plaintiffs an interest in land which could form the subject of compensation under the Lands Clauses Consolidation Act, 1845, s. 68.

APPEAL from the judgment of Wright J. in an action tried before him without a jury.

The action was upon an award made by an arbitrator under the Lands Clauses Consolidation Act, 1845, as after mentioned.

By an agreement made between persons who were the lessees of the Globe Theatre in the Strand for a term of twenty-one years, described in the agreement as the landlords, and the plaintiffs, therein described as the tenants, it was provided so far as material as follows:—

"The landlords hereby grant and let, and the tenants hereby take for the term of the landlords' lease commencing the first day of September, 1900, the free and exclusive right to sell refreshments at the Globe Theatre, Newcastle Street, Strand, London, with the necessary use of the refreshment rooms and bars and cloak rooms and wine cellars of the said theatre, together with the free right during the usual hours, of the tenants, their servants and agents, of free access to and from all parts of the house, including the front of the theatre, and premises as may be necessary and is usual and proper according to the custom of the theatres, for the purpose of

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exercising the rights granted by this agreement, and also the free and exclusive right during the aforesaid term of supplying to the visitors and other people attending the theatre wines, spirits, liqueurs, cigars, cigarettes, flowers, scent, and refreshments of all kinds, programmes, books of words, books of music, opera glasses, and all other articles, and of providing cloak rooms and other accommodation, and also the sole and exclusive privilege during the aforesaid term of advertising and letting spaces for advertisements, which shall be confined to the refreshment and cloak rooms and on all programmes used and offered for sale at the said theatre. The tenants shall pay to the landlords in respect of the said rights hereby granted the weekly rental of 35*l.* and 2*l.* for each matinee. The tenants shall supply at their own expense suitable programmes for the use of the audience of the said theatre, to be approved by the landlords, and the advertisements in the theatre shall be confined to the refreshment bars and rooms, and cloak rooms, and such advertisements shall be of such a nature as will not injure the character of the theatre, and as are usually found at first-class theatres. The tenants shall provide and maintain a proper and efficient staff of attendants for the service of the refreshment bars and rooms and cloak rooms, and for the sale of programmes, books of words, music, and other articles. The tenants shall be entitled to charge, receive, and retain all reasonable and usual fees, and profits, for sale of refreshments, programmes, books of words, music, cloak rooms, and other articles supplied to the audience, and others, of the said theatre, and for the letting of advertising spaces. There is to be a fixed charge for programmes as follows: for boxes, stalls, dress and upper circles, the charge to be sixpence, and for the pit and gallery the charge to be twopence, and the cloak-room charge to be sixpence. If from any cause whatever no performance shall be given in the theatre on any day or days other than a Sunday in any week, the tenant shall be entitled in respect of each such day or days on which no performance shall be given to a remittance of one-sixth part of the week's rent, such remittance to be deducted and allowed from the next payment of rent. The

tenants agree to print, provide, and distribute at their own cost programmes free of charge on the first night performance of any new or revised piece, being a principal piece, but not in any opening piece or farce, except a principal piece."

It appeared that the key of the cellars at the theatre had been given by the lessees to the plaintiffs, who had kept the cellars locked, and used them for the purpose of storing the wines and spirits which were to be sold in the theatre. Advertisements had been affixed by nails to the walls in the parts of the theatre in which by the agreement such advertisements might be exhibited.

The defendants, having power to purchase the Globe Theatre compulsorily under the London County Council (Improvements) Act, 1899, which incorporated the Lands Clauses Consolidation Acts, gave notice of their intention so to do in February, 1902, whereupon the plaintiffs claimed compensation in respect of their interest under the above agreement. An arbitrator was appointed to determine the amount of compensation (if any) to be paid by the defendants to the plaintiffs in respect of their interest (if any) in the hereditaments taken or the interest (if any) therein which the plaintiffs were enabled to sell under the London County Council (Improvements) Act, 1899, or the Acts incorporated therewith, and also the amount of the damage (if any) from disturbance, &c., and other loss incidental to or by reason of the taking of the land by the defendants. The arbitrator awarded the sum of 2568*l.* 9*s.* as purchase-money and compensation due in respect of the plaintiffs' interest (if any), and damage (if any) for disturbance, &c. The plaintiffs sued to recover that amount.

The learned judge held that the plaintiffs had no interest in land which entitled them to compensation under the Lands Clauses Consolidation Act, 1845, and therefore gave judgment for the defendants.

J. G. Witt, K.C., and *J. D. Crawford*, for the plaintiffs. The agreement made in this case between the lessees of the theatre and the plaintiffs conferred upon the latter an interest

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in land, such as formed a subject for compensation under the Lands Clauses Consolidation Acts. A mere licence not coupled with any interest, such as a licence given to go on land for purposes of pleasure, as, for instance, a licence to play cricket in a field, of course, would not confer an interest in land; but it is contended that, where the licence is coupled with an interest, and is therefore irrevocable, as where a licence is given for valuable consideration to go on land for the purpose of making profit upon and by the use of the land, an interest in land is for the purposes of the Lands Clauses Consolidation Acts created. It is not necessary for this purpose that the profit should be a profit à prendre in the technical sense that it must issue out of the land itself. It is clear, moreover, having regard to some of the provisions of the agreement in this case, namely, those which provide for the use of the cellars, and of parts of the premises for advertisements, that actual and exclusive physical occupation by the plaintiffs of those parts of the premises was contemplated. In the case of the refreshment rooms the occupation could not perhaps be considered exclusive; but the "necessary use" of the cellars would involve the occupation of them; and the evidence was that the plaintiffs had the key and kept them locked. Obviously that was absolutely necessary with a view to the safety of their contents. Again, the exhibition of advertisements involved physical occupation of the portions of the walls or other structures to which they were affixed. The case of *Edwardes* v. *Barrington* (1) is not really an authority which governs this case. There the question was whether there had been a subletting, or parting with possession of, premises, so as to constitute a breach of the covenant, which entitled lessors to re-enter. The Courts never lean towards a forfeiture in doubtful cases. It is submitted that the question whether an interest is such as to form a subject of compensation under the Lands Clauses Consolidation Acts, where there has been a compulsory expropriation of a person interested, is of such an entirely different nature from the question whether there has been a forfeiture for breach of a covenant not to assign,

(1) (1901) 85 L. T. 650.

or part with the possession of, premises, that a decision on the latter question is hardly applicable to the present case.

[They cited *Wickham* v. *Hawker* (1); *Muskett* v. *Hill* (2); *Daly* v. *Edwardes* (3); *Bird* v. *Great Eastern Ry. Co.* (4); *Corporation of Westminster* v. *Johnson* (5); *In re Masters and Great Western Ry. Co.* (6); *Temple Pier Co.* v. *Metropolitan Board of Works* (7); *Webber* v. *Lee.* (8)]

Dickens, *K.C.*, and *Morten*, for the defendants, were not called upon to argue.

COLLINS M.R. This is an appeal from the judgment of Wright J. in an action for the amount awarded by an arbitrator upon a claim made by the plaintiffs for compensation under the Lands Clauses Consolidation Act, 1845, s. 68, in respect of an alleged interest in land taken or injuriously affected in the exercise of the defendants' powers. It is well settled that the function of the arbitrator in such a case is not to decide on the legal right, but merely, on the assumption that the right exists, to ascertain the damage occasioned by interference with it. The question therefore now arises whether the plaintiffs are entitled to compensation under the Act. The subject-matter for compensation under the section is land, or an interest in land. The plaintiffs say that they had an interest in land, namely, in the Globe Theatre, which was compulsorily taken by the defendants, by virtue of an agreement, by which they were granted a right to supply refreshments in the theatre, and other incidental privileges in connection therewith. The question is whether, having regard to the purposes of that agreement, and the terms in which it is expressed, it can be said to confer any interest in land or not.

It has been argued for the plaintiffs that, on the true construction of the agreement, they took under it something more than a mere licence, and that in effect it gave them an interest

(1) (1840) 7 M. & W. 63; 56 R. R. 623.
(2) (1839) 5 Bing. N. C. 694; 50 R. R. 832.
(3) (1900) 83 L. T. 548.
(4) (1865) 19 C. B. (N.S.) 268.
(5) Ante, p. 19.
(6) [1901] 2 K. B. 84.
(7) (1865) 34 L. J. (Ch.) 262.
(8) (1882) 9 Q. B. D. 315.

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in land. There has been a decision of the House of Lords, in the case of *Edwardes* v. *Barrington* (1), which was looked upon by Wright J. as being decisive of the matter, and, notwithstanding the argument adduced to us, I cannot see any escape from the conclusion at which he arrived. In that case, as in the present, the question was whether an interest in land was conferred by an agreement. In the case before us the agreement is more artificially drawn than that which was in question before the House of Lords. There the chief difficulty arose from the fact that the person who had framed the agreement had used terms the meaning of which he apparently did not really understand. It was held, however, that, notwithstanding the use of some expressions which might point to an interest in land, yet, having regard to the whole scope of the agreement, no such interest was conferred, the transaction not being in reality a demise of, or a grant of any interest in land, but merely an agreement conferring a privilege by way of licence to the grantee. In that case a demise of a theatre contained a covenant by the lessee not "to assign, demise, or otherwise part with this indenture, or any estate or interest therein," without the licence of the lessor: and the ultimate question was, no doubt, whether the effect of the agreement was such that there had been an assignment, or parting with possession, of the demised premises, or any estate or interest therein, so as to constitute a breach of the covenant and to work a forfeiture; but the question on which that depended was the same as that upon which the present case depends, namely, whether the agreement was one which conferred an interest in land; and, unless the House of Lords had held that it did not, they could not have held that there was no breach of the covenant. So far as there is any distinction between the agreement in that case and that with which we are now dealing, it appears to me that the terms of the latter point more distinctly than those of the former to the conclusion that a mere privilege or licence is intended to be given under it, and not an interest in land. It seems to me that the agreement in this case is carefully framed so as to exclude the

(1) 85 L. T. 650.

notion that there was to be anything like a demise of any part of the premises. It witnesses that "the landlords hereby grant and let and the tenants hereby take for the term of the landlords' lease, commencing September 1, 1900, the free and exclusive right to sell refreshments at the Globe Theatre, Newcastle Street, London, with the necessary use of the refreshment rooms and bars and cloak rooms and wine cellars of the said theatre, together with the free right during the usual hours, of the tenants, their servants and agents, of free access to and from all parts of the house, including the front of the theatre, and premises, as may be necessary, and is usual and proper according to the custom of the theatres, for the purpose of exercising the rights granted by this agreement, and also the free and exclusive right during the aforesaid term of supplying to the visitors and other people attending the theatre wines, spirits, liqueurs, cigars, cigarettes, &c., and all other articles, and of providing cloak rooms and other accommodation, and also the sole and exclusive privilege during the aforesaid term of advertising and letting spaces for advertisements, which shall be confined to the refreshment and cloak rooms and on all programmes used and offered for sale at the said theatre." The tenants were to pay the landlords a weekly rental of 35*l.*, but, if from any cause whatsoever no performance was given in the theatre on any day or days of the week other than Sunday, the tenants were to be entitled to a remission of one-sixth from the weekly rent in respect of each such day. Though the word "let" is used, the subject-matter of the letting is so defined, it seems to me, as most carefully to exclude the idea that any interest in land is to be given. Instead of letting the refreshment rooms or the cellars, the agreement provides merely for the use of them by the plaintiffs so far as necessary for its purposes. Even if some of the provisions of the agreement, which have been more particularly relied on by the plaintiffs' counsel, such as those which give the right to advertise, and let spaces for advertisements, and to use cellars, taken alone, might seem to involve an exclusive use of parts of the premises, and primâ facie to point to a demise of those parts, they must, I think, be read in connection

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with the context, and, taking the agreement as a whole, in my opinion the effect of it is merely to provide for the exercise of privileges by the plaintiffs by way of licence, and not to create an interest in land. The agreement in the case of *Edwardes* v. *Barrington* (1) was one of the same kind as this, and, though the words used in that case afforded more ground than do those in the present case for the argument that there was a demise of part of the premises, nevertheless it was held that the agreement conferred no interest in land. It appears to me that it is impossible to distinguish that case from the present in any sense favourable to the plaintiffs. That being so, I do not think it necessary to discuss in detail the arguments adduced to us for the plaintiffs, and the distinction drawn between a mere licence and a licence to take a profit out of land, such as a profit à prendre. It is not necessary to decide the point; but I think the plaintiffs' counsel failed to support the main proposition which they put forward in their argument, namely, that a licence to make a profit on land by trading upon it stood on the same footing for this purpose as a profit à prendre. In the case of a profit à prendre the profit arises out of the land itself, as in the case of the right to take animals feræ naturæ on the land, and that is the reason why a contract with reference to such a right has been held to come within the 4th section of the Statute of Frauds. There is no authority to shew that a licence to carry on a trade on land can be regarded for this purpose as analogous to a profit à prendre. For these reasons I think the appeal must be dismissed.

ROMER L.J. I am of the same opinion. On the construction of the agreement under which the plaintiffs claim, I think that, like that in the case of *Edwardes* v. *Barrington* (1), it only gave a licence, strictly and properly so called, to the persons claiming under it, and did not create any estate or interest in land in their favour. It did not, I think, amount to a demise, nor to a parting, in respect of any portion of the premises, with the possession, which the lessees of the theatre had, when the

(1) 85 L. T. 650.

agreement was made. The possession of the theatre, and of every part of it remained, in my opinion, in the lessees, subject only to the right of the plaintiffs under the agreement to use certain parts of the premises for its purposes. Nor was there any easement properly so called, nor any profit à prendre, nor any incorporeal right created in favour of the plaintiffs. There was no such right created, either at law or in equity, as constitutes any known estate or interest in land. The true object and effect of such an agreement were very clearly pointed out with reference to a similar agreement in *Edwardes* v. *Barrington*. (1) Reliance was placed by the plaintiffs' counsel upon the words "necessary use of the refreshment rooms and bars and cloak rooms and wine cellars." I do not think that it would really make much difference, even if the words used had been "exclusive use"; for in *Edwardes* v. *Barrington* (1) the words were "exclusive right to the use of." I think "necessary use" only means use so far as is necessary to enable the plaintiffs to supply refreshments in the theatre at the proper times when it is being used as a theatre, and certainly does not involve an absolute parting with the possession of those parts of the theatre by the lessees to the plaintiffs. Again, the fact that the lessees appear to have entrusted the key of the cellars to the plaintiffs for the purpose of preventing strangers from getting in makes to my mind no difference. It appears to have been a voluntary act on the part of the lessees, and could not amount to the creation of any interest not expressed by the agreement itself, which primâ facie created a licence only in favour of the plaintiffs.

As there has been a good deal of discussion during the argument with regard to the nature of a licence, I should like to refer to what is said on the subject by Vaughan C.J. in the case of *Thomas* v. *Sorrell* (2) where, speaking of the general effect of a licence properly so called, he says that "a dispensation or licence properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful which without it had been unlawful." He then gives as instances a licence to hunt in a man's park or to come into his house, and

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(2) (1674) Vaugh. 351.

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proceeds to point out that, where there is, in addition to the mere licence to go on the land, leave to take something out of the land, as for instance where there is a licence to hunt in a man's park and carry away the deer killed, or to cut down a tree in a man's ground, and carry it away, there is, as regards the going on the land to hunt, or cut down the tree, a mere licence, but, as regards the carrying away of the deer killed, or the tree cut down, there is a grant: that is to say that in such cases there is not merely a licence properly so called, but a right in the nature of a profit à prendre, i.e., to take something out of the soil. Now, in the present case is there anything beyond a mere licence properly so called? The only parts of the agreement to which counsel could particularly refer, as supporting the contention that there was more than a mere licence, were those which related to the use of the cellars, and the right to advertise, and let spaces for advertisements, in certain parts of the theatre. Do those parts of the agreement amount merely to a licence properly so called, or to a grant of an interest in, or something arising out of, the land? To my mind it is clear that they create nothing more than a licence properly so called. The agreement for use of the cellars does not necessarily involve that the possession of them is given to the plaintiffs, and therefore does not amount to the grant of an interest in the cellars. Similarly, I think the agreement for the use of parts of the premises for advertisements does not import a grant of the walls or any part of the premises. It is not necessary, in my opinion, in order to give effect to the rights conferred by this agreement, to imply any grant of any estate or interest in land, or of any profit à prendre. It was admitted that mere licences, generally speaking, do not create an interest in land, but it was contended that a distinction ought to be drawn between licences given merely for purposes of pleasure and those given to be exercised for purposes of profit. There appears to be a distinction in two respects between licences for pleasure and licences for profit. In the case of a licence given to go on land for purposes of pleasure, there appears to be authority for saying that the licence is to be construed strictly, and, in the absence of a sufficient context, must be held not to confer

anything beyond a mere personal licence, and not to extend to servants or agents, but that it is otherwise where the licence is for the use of land or other property for the purposes of profit, in which case the licence may be construed as extending, not only to the licensee himself, but also to his servants, and possibly his agents. There is also another distinction, which depends on the sense in which the word "profit" is used. As I have already pointed out there is a distinction between a mere licence to go on land, and a grant of a profit to be derived out of the land itself. But, as regards a profit to be obtained by the exercise of the licence on the land, but which is not derived out of the land itself, I cannot see how, either upon principle or authority, the distinction attempted to be made for the present purpose between a licence for purposes of pleasure and a licence for purposes of profit can be supported. It cannot in law be the case, in my opinion, that if a man gave a licence to persons to come on to his field to play at cricket, and to other persons a licence to come there for the purpose of supplying those engaged in the game with refreshments for profit, the one licence would not confer an interest in land but the other would. These considerations appear to me to be conclusive of the case. It is hardly necessary to say in conclusion that it does not follow from the fact that an agreement of the kind which was here entered into does not create an interest in land, but only a licence, and therefore will not support a claim for compensation under the Lands Clauses Consolidation Act, that such an agreement does not create contractual rights in respect of which an action will lie in the event of contravention of them.

MATHEW L.J. I am of the same opinion. It appears to me clear that, upon the construction of the agreement in this case, it only conferred a privilege or licence, and did not amount to a demise, or create an interest in land. The decision of the House of Lords in *Edwardes* v. *Barrington* (1) is an awkward obstacle in the way of the plaintiffs' contention. It was argued for the plaintiffs that a contract

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granting a privilege or licence, from the exercise of which upon land profits might be derived, created an interest in land in respect of which, under s. 68 of the Lands Clauses Consolidation Act, 1845, compensation might be claimed. That section speaks of "compensation in respect of any lands, or of any interest therein, which shall have been taken for, or injuriously affected by the execution of the works." The word "taken" involves that the person to be compensated has had, and has been deprived of, the land, or some interest therein; and it seems to me impossible to doubt that the section contemplates as the subject-matter of compensation land or some estate, or interest in it, and not a mere licence or contractual privilege such as was conferred by the agreement in the present case. It was argued for the plaintiffs that this agreement amounted to a demise of parts of the premises. If the intention was to effect such a demise, language more inappropriate could hardly have been used. The words "necessary use" are employed in respect both of the refreshment rooms and the cellars; and, though it was admitted that, in the case of the refreshment rooms, those words could hardly amount to a demise, it was contended, nevertheless, that, in the case of the cellars, there was a demise. I do not see how the same words can be construed differently as regards the two subject-matters. It seems to me clear that there was not a demise or grant of any interest in the cellars. The words "necessary use" indicate that all that was intended was that the plaintiffs should be allowed to have the use of the cellars as ancillary to the general purposes of the agreement; and it could not be denied, I think, that any use of the cellars by the plaintiffs for purposes other than those of the agreement would be in the nature of a trespass by them. With regard to the right of advertising and letting spaces for advertisements also, it appears to me that the terms in which that right is given are such as to exclude the notion that any demise of the walls or any part of the refreshment rooms was intended. Taking the whole of the agreement together, I think the proper construction of this, and other provisions relied on for the plaintiffs, is that they are merely

intended to serve the general object of the agreement, and therefore were not meant to create any interest in land. In the case of *Edwardes* v. *Barrington* (1) there was more to be said for the conclusion that an interest in land was conferred; but the House of Lords had no hesitation in deciding that, looking at the agreement as a whole, the proper construction was that it conferred no such interest, and that any expressions indicating that it did must be construed in accordance with the general intention.

Appeal dismissed.

Solicitors for plaintiffs: *Hannay & Reynolds.*
Solicitor for defendants: *W. A. Blaxland.*

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Jan. 12, 13, 14, 15, 18, 19, 20, 21, 22, 25, 26; *Feb.* 2, 16, 17; *March* 8.

Sale of Goods—Implied Condition—Breach—Measure of Damages—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *ss.* 11, 13, 14 *sub-s.* 2, 53 *sub-s.* 2.

The defendants contracted to sell by description to the plaintiffs sulphuric acid, commercially free from arsenic. The plaintiffs did not make known to the defendants, either expressly or by implication, the purpose for which they required the acid. In breach of the implied condition that the acid should correspond with the description in the contract, the defendants supplied to the plaintiffs sulphuric acid which was not commercially free from arsenic. The plaintiffs by the exercise of ordinary care might have discovered the presence of arsenic in the acid; but they did not do so, and, in ignorance of the fact, used the acid in the manufacture of brewing sugar in the shape of invert and glucose, which they sold to brewers who used it in the brewing of beer. The beer thus made was rendered poisonous, and the brewers suffered loss in respect of which the plaintiffs were liable to them. The plaintiffs also lost the price of the acid, which was rendered worthless to them, and the value of other goods spoilt through being mixed with the acid; and the goodwill of their business was damaged:—

Held, that the plaintiffs were entitled to recover from the defendants the price of the acid and the value of the goods spoilt, but not the damages payable by the plaintiffs to the brewers or the damage to the goodwill of the plaintiffs' business.

ACTION in the commercial list tried by Bruce J. without a jury.

(1) 85 L. T. 650.

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The plaintiffs claimed to recover damages from the defendants for fraudulent misrepresentation (1) and breach of contract.

It was agreed between the parties that the question of the defendants' liability should first be tried, and that the question as to the amount of damages recoverable, if any, should be argued after judgment had been given on the question of liability.

The facts, as found by Bruce J., were as follows: The plaintiff company was formed in 1896 to take over the business of Bostock & Co., which firm had carried on business at Garston as sugar refiners and manufacturers of brewing sugars in the shape of invert and glucose. For the purpose of the manufacture of invert and glucose Bostock & Co. from the year 1888 onwards, and afterwards their successors, the plaintiffs, down to 1900, purchased from the defendants sulphuric acid. The defendants never were informed by Bostock & Co. or by the plaintiffs of the purpose for which acid was wanted, or to which it was being applied.

Sulphuric acid made from free or uncombined sulphur does not contain any appreciable quantity of arsenic, but acid made from pyrites does contain arsenic unless it has undergone a process to extract the arsenic and other impurities from it. From 1888 to 1892 the acid supplied by the defendants to Bostock & Co. was what is known in the trade as D.O.V. or double oil of vitriol, to distinguish it from B.O.V. or brown oil of vitriol. From 1892 onwards the acid supplied was B.O.V. In both cases the acid was made from pyrites, but was commercially free from arsenic.

In January, 1900, the plaintiffs gave their order for the year to the defendants to supply "all the B.O.V." the plaintiffs might require during the year. The defendants under this contract supplied to the plaintiffs sulphuric acid made from pyrites, but commercially free from arsenic, until March, 1900, when, without any notice to the plaintiffs, they commenced to

(1) The learned judge found as a fact that there had been no fraudulent misrepresentation, and the facts relating to this part of the case are therefore omitted from this report.

supply sulphuric acid unpurified and containing arsenic. The plaintiffs, from March to November, 1900, not knowing that the acid supplied to them contained arsenic, used the acid, so supplied to them, for making invert and glucose which was sold by them to brewers for making beer. The result was that a large number of persons who drank the beer were made seriously ill, and some died. The plaintiffs were thereafter unable to carry on their business, and in this action they sought to be indemnified by the defendants for the loss which they had sustained. The learned judge having dealt with the question of fraudulent misrepresentation, and having found as a fact that there had been no fraudulent misrepresentation on the part of the defendants, found that, having regard to the dealings between the plaintiffs and their predecessors and the defendants, B.O.V. meant, as between them, sulphuric acid commercially free from arsenic, and that there was therefore a contract for the sale of goods by description within s. 13 of the Sale of Goods Act, 1893, i.e., a sale of B.O.V. commercially free from arsenic, and there was therefore an implied condition that the goods should correspond with that description; that when, in March, 1900, the defendants delivered acid containing arsenic, there was a breach of that implied condition; that the plaintiffs did not expressly or by implication make known to the defendants the particular purpose for which the goods were required, so as to bring into operation s. 14, sub-s. 1, of the Act; that the plaintiffs' chemist might, by the exercise of ordinary care, have discovered the presence of the arsenic in the acid before it was used, and that the plaintiffs' consulting chemists might have discovered the presence of arsenic in the glucose and invert manufactured by the plaintiffs.

Feb. 16. The case came on for further consideration as to the damages recoverable from the defendants.

Damages were claimed under the following heads:—

1. The price paid for the acid supplied which contained arsenic, which was worthless to the plaintiffs.

2. The value of material used for the purpose of making

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glucose and invert which was spoilt by being mixed with acid containing arsenic.

3. Compensation for the loss of the goodwill of the plaintiffs' business.

4. The damages which the plaintiffs were liable to pay to the brewers who had been supplied by the plaintiffs with glucose and invert made out of acid containing arsenic.

The defendants, whilst denying liability, had paid 1000*l.* into court.

C. A. Russell, K.C., Danckwerts, K.C., G. Rhodes, and *Rogerson,* for the plaintiffs. The contract was for the sale of sulphuric acid commercially free from arsenic; and there was, therefore, an implied condition that the goods supplied should correspond with that description: Sale of Goods Act, 1893, s. 13. There has been a breach of that condition, and the plaintiffs' rights are regulated by s. 11. Rejection of the goods being in the circumstances impossible, the plaintiffs are bound to treat the breach of contract as a breach of warranty, and their sole remedy is by way of damages. Whether the implied condition relates to the description of the goods under s. 13, or as to their fitness for a particular purpose under s. 14, sub-s. 1, the position of the buyer, with regard to his claim for damages for a breach of the condition, is the same: *Randall* v. *Newson* (1); *Drummond* v. *Van Ingen.* (2) In both cases the measure of damages is governed by s. 53 of the Act, sub-s. 2 of which provides that it is to be the estimated loss directly and naturally resulting in the ordinary course of events from the breach of warranty. It will be contended for the defendants that the case comes within sub-s. 3 of s. 53, which says that in the case of a breach of warranty of quality the loss is primâ facie the difference between the value of the goods as supplied and their value if they had answered to the warranty. That sub-section only lays down a rule which is to be primâ facie the governing rule; it does not cut down the effect of sub-s. 2. Further, sub-s. 3 only applies to cases of breach of warranty of quality, that is to say, a warranty in the strict sense, which

(1) (1877) 2 Q. B. D. 102. (2) (1887) 12 App. Cas. 284.

gives no right to reject the goods, and sub-s. 3 has no application to cases under s. 13 and s. 14, sub-s. 1, both of which deal with implied conditions the breach of which give the right of rejection, or, as an alternative, a claim for damages. The difference between a warranty of quality and a condition that the goods shall answer a given description is most material when considering the question of measure of damages: *Nichol* v. *Godts* (1); *Josling* v. *Kingsford* (2); *Wieler* v. *Schilizzi*. (3) The present case, not being a case of warranty of quality, therefore comes within s. 53, sub-s. 2, and not within sub-s. 3. Under sub-s. 2 (as also under ss. 50 and 51, which deal with damages for non-acceptance and non-delivery) there is no question as to what was in the contemplation of the parties, or in the knowledge of the seller at the time the contract was made. The Act has excluded that element except in cases of special damage—damage provided for by s. 54: *Hadley* v. *Baxendale* (4); *Hydraulic Engineering Co.* v. *McHaffie*. (5) The damages under all the heads claimed are damages directly and naturally resulting in the ordinary course of events from the breach of contract. Glucose and invert have been used for brewing purposes for many years, and the use of sulphuric acid in the manufacture of glucose and invert and other food products is an ordinary and well-recognised use of sulphuric acid. The damages claimed all resulted directly and naturally from the plaintiffs using sulphuric acid containing arsenic in the manufacture of glucose and invert. The fact that the defendants did not know the precise purpose for which the acid was bought is immaterial if, as the fact was, it was when bought used in a customary and well-recognised manner: *Wilson* v. *Dunville* (6); *Randall* v. *Raper* (7); if knowledge is material, the terms of the contract would tell the defendants that the acid was to be used in the plaintiffs' business. It makes no difference that the plaintiffs, instead of reselling the acid as acid, used it in the manufacture of glucose, which they sold

(1) (1854) 10 Ex. 191.
(2) (1863) 13 C. B. (N.S.) 447.
(3) (1856) 17 C. B. 619.
(4) (1854) 9 Ex. 341.
(5) (1878) 4 Q. B. D. 670.
(6) (1879) L. R. Ir. 6 C. L. 210.
(7) (1858) E. B. & E. 84.

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to brewers. The liability of the plaintiffs to the brewers who bought the glucose and the plaintiffs' loss of business followed as a natural consequence from the presence of arsenic in the sulphuric acid, just as in *Randall* v. *Raper* (1) the liability of the purchaser to his sub-purchaser resulted from the seller's breach of warranty. The only difference between that case and the present one is that there the purchaser did not treat the goods with any process before reselling; but that circumstance does not affect the principle. The defendants having warranted the sulphuric acid to be free from arsenic, the plaintiffs were entitled to assume that it was so, and to deal with it on that footing, and this consequence of the existence of the warranty is clearly shewn by the decision in *Hill* v. *Balls*. (2) Although in some of the cases decided before the Act judges when speaking of the natural and probable consequences of a breach of contract have introduced considerations of what was in the contemplation of the parties or what was the knowledge of the defendant, still in other cases damages have been held to be recoverable quite independently of these considerations: *Mullett* v. *Mason* (3); *Dingle* v. *Hare* (4); *Smith* v. *Green* (5); and the Act has adopted the latter view by deliberately excluding any reference to what was in the contemplation of the parties. The Act is a codifying Act, and its meaning must be ascertained from the language used, not by roaming over a vast number of previous decisions in which conflicting dicta occur, to do which would frustrate the very object of the Act and destroy its utility: *Bank of England* v. *Vagliano* (6), per Lord Herschell. It will no doubt be contended that the damages resulted from the failure of the plaintiffs to detect the presence of arsenic, which it is found that they might have done by the exercise of ordinary care. The answer to this argument is that the plaintiffs owed no duty to the defendants to examine the acid; they had a warranty that the goods answered a certain description, on which they were entitled to and did rely. On this point

(1) E. B. & E. 84.
(2) (1857) 2 H. & N. 299.
(3) (1866) L. R. 1 C. P. 559.
(4) (1859) 7 C. B. (N.S.) 145.
(5) (1875) 1 C. P. D. 92.
(6) [1891] A. C. 107, at p. 144.

Mowbray v. *Merryweather* (1) is a conclusive authority in favour of the plaintiffs.

Sir E. Clarke, K.C., Tindal Atkinson, K.C., Montague Lush, K.C., and E. O. Simpson, for the defendants. The utmost that the plaintiffs can recover as damages is the difference between the market price of the goods which they were entitled to receive under their contract and the value of the goods which they in fact received, and the money paid into court is sufficient to cover the damages assessed on that footing. The Sale of Goods Act has not altered the law with regard to the measure of damages, but has merely stated in a definite form the rules applicable; nor have the old decisions as to the knowledge of the vendor and as to what was in the contemplation of the parties been superseded by the language of s. 53, sub-s. 2. The same test has still to be applied. The direct and natural result of a particular act is one which must have been in the contemplation of the parties. An indirect result might in certain cases be contemplated, and, if so, damages would be recoverable on that footing as special damage under s. 54. But this is the first time that it has ever been contended that the measure of damages, in a case of a breach of an implied condition that the goods shall answer a certain description, is the loss which the buyer has sustained by the use of the goods, without any knowledge on the part of the seller of the purpose for which the goods were going to be used. There is no authority for that proposition to be found either in the language of the Act itself or in the previous decisions. On the contrary, there is authority against it: *Fitzgerald* v. *Leonard*. (2) The plaintiffs are seeking in effect to recover in a case under s. 13 damages which are only recoverable in cases under s. 14, sub-s. 2. If their argument is correct, there was no need for s. 14, sub-s. 2, because their contention is that the same damages are recoverable when the seller has committed a breach of an implied condition as to description as when the goods do not answer the purpose for which the seller knew they were intended. It is not correct to say that it is only in cases of warranty of quality under s. 53, sub-s. 3, that the

(1) [1895] 2 Q. B. 640. (2) (1893) L. R. Ir. 32 C. L. 675.

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damages are the difference between the value of the goods as received and their value if they had answered to the warranty; in all cases where the only direct and natural result of a breach of contract is that the buyer gets something of less value than that for which he stipulated, as here, that measure of damage is the only one applicable. The cases relied on for the plaintiffs are either cases where the question was one of liability and not of damages, or cases where the seller knew or must be taken to have known the purpose for which the goods were required. With the exception of the first head of claim, the damages sought to be recovered in this case are the result of something done to the goods by the plaintiffs after they had left the defendants' hands, over which the defendants had no control, and which was not communicated to the defendants at the time of the contract. This damage cannot be said to be loss directly and naturally resulting from the defendants' breach of contract, for there has been an intervening cause, namely, the manufacture of the glucose by the plaintiffs. *Randall* v. *Raper* (1) does not assist the plaintiffs, for that was a case of a thing sold with a warranty, the seller having knowledge that the buyer was going to resell it under the same warranty. Here the plaintiffs never did resell the goods bought from the defendants, but an entirely different manufactured article, and the warranty under which the plaintiffs sold glucose to the brewers was also different because the plaintiffs knew the purpose for which the brewers bought glucose. The decision in *Randall* v. *Newson* (2) turned on the question whether on a sale of a chattel for a specific purpose the warranty rendered the vendor liable for the consequences of a latent defect. It is said that the defendants are liable to all the consequential damages claimed apart from special knowledge on their part, because the user of sulphuric acid in the manufacture of glucose is a well-known process; but, having regard to the numerous purposes for which sulphuric acid is used, in many of which the presence of arsenic would not be harmful, no liability can be founded on that argument: *Drummond* v. *Van Ingen* (3); *Jones* v.

(1) E. B. & E. 84. (2) 2 Q. B. D. 102. (3) 12 App. Cas. 284.

Padgett. (1) The damages were not suffered through the plaintiffs' relying on the defendants' warranty, but through want of care on the part of the plaintiffs' servants in not examining the acid before it was used. In *Mowbray* v. *Merryweather* (2) there was no independent act of negligence or want of duty on the part of the plaintiffs.

[In addition to the authorities cited in the arguments for the plaintiffs, counsel also referred to *Horne* v. *Midland Ry. Co.* (3), *British Columbia Sawmill Co.* v. *Nettleship* (4), *Scott* v. *Foley* (5), *Agius* v. *Great Western Colliery Co.* (6), and Mayne on Damages, 7th. ed. p. 10.]

Russell, K.C., replied.

Cur. adv. vult.

March 8. BRUCE J. read the following judgment:—The judgment already delivered found that there was a contract for the sale of goods by description within s. 13 of the Sale of Goods Act, 1893—that is, a sale of B.O.V. commercially free from arsenic, and that there was an implied condition that the goods supplied should correspond with that description; and when the defendants, in March, 1900, delivered B.O.V. which was not commercially free from arsenic, there was a breach of the implied condition. It was further found by the judgment that the buyer did not expressly, or by implication, make known to the seller the particular purpose for which the goods were required, so as to bring into operation sub-s. 1 of s. 14 of the Sale of Goods Act. The question now arises, what are the damages which the plaintiffs are entitled to recover against the defendants? The plaintiffs claim, first, the price paid for the acid supplied, which was not commercially free from arsenic. They say that the acid was worse than useless to them, and that the price paid for it was wholly thrown away. Secondly, the plaintiffs claim the value of the material used for the purpose of making glucose and invert, which was spoilt by its being mixed with acid which proved to

(1) (1890) 24 Q. B. D. 650.
(2) [1895] 2 Q. B. 640.
(3) (1873) L. R. 8 C. P. 131.
(4) (1868) L. R. 3 C. P. 499.
(5) (1899) 5 Com. Cas. 53.
(6) [1899] 1 Q. B. 413.

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be poisonous at a time when the plaintiffs supposed the acid to be commercially free from arsenic. Thirdly, the plaintiffs claim a large sum of money as compensation for the goodwill of the business which the plaintiffs carried on as manufacturers of invert and glucose, and which the plaintiffs say has been entirely destroyed by the act of the defendants in supplying them with poisonous acid. Fourthly, the plaintiffs, before they discovered the poisonous properties of the acid, sold to brewers, for the purpose of being used in the brewing of beer, invert and glucose made from the poisonous acid, and they claim from the defendants the amount of damages which the brewers are entitled to recover against them.

In order to arrive at the damages which the plaintiffs are entitled to recover, we must consider the provisions of the Sale of Goods Act, 1893. Sect. 11, sub-s. 1 (*a*), enacts that where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty. In the present case the plaintiffs, the buyers, accepted the acid in ignorance that it did not fulfil the condition that it was commercially free from arsenic. Had they known of the breach of condition, they might have refused to accept the goods; but having accepted the goods in ignorance of the breach of condition, I think the case is one to which s. 11, sub-s. 1 (*c*), applies. That sub-section enacts that where the property has passed to the buyer the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty in the absence of a special term to the contrary. Sect. 53, sub-s. 1, enacts that where the buyer is compelled to treat any breach of a condition on the part of the seller as a breach of warranty the buyer may (*b*) maintain an action for damages for the breach of warranty. Sub-sect. 2 enacts that the measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty. Sub-s. 3 of s. 53, which relates only to a breach of warranty of quality, has, I think, no bearing in the present case. *Nichol* v. *Godts* (1)

(1) 10 Ex. 191.

and *Josling* v. *Kingsford* (1) illustrate the distinction between a mere warranty of quality and a condition that the goods shall correspond with the description. Although in circumstances such as have happened in this case the buyer is compelled to treat the breach of the condition as a breach of warranty, yet in point of fact the damages for such breach of warranty are different from the damages which follow from a mere breach of warranty of quality.

The damages in the present case must, I think, be determined by the rule laid down in s. 53, sub-s. 2. Before I proceed to consider the meaning and application of this sub-section, I may refer to s. 54, which enacts that nothing in this Act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable. These two sections seem to be framed upon the rules laid down in *Hadley* v. *Baxendale*. (2) The passage is as follows: "Where two parties have made a contract which one of them has broken, the damages which the other ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself"—that seems to express the first rule; the following words seem to express the second rule: "or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. The words expressing the first rule have received general acceptance in a number of cases that were decided prior to the passing of the Sale of Goods Act, 1893. The words expressing the second rule have been subject to some criticism in the case

(1) 13 C. B. (N.S.) 447. (2) 9 Ex. at p. 354.

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of the *British Columbia Sawmill Co.* v. *Nettleship* (1) and in other cases; and the Legislature, in framing the Sale of Goods Act, which was intended to be a consolidation Act, seem to have adopted the first rule in s. 53, sub-s. 2. The second rule the Legislature did not adopt, but by the provisions of s. 54 left at large the right of the buyer or seller to recover special damages in any case where by law special damages may be recoverable.

In the present case no special circumstances were communicated to the defendants so as to make them responsible for damages which would not ordinarily flow from their breach of contract. Therefore it seems to me the question I have to determine in this case must be determined by the rule laid down in sub-s. 2 of s. 53; in other words, what is the estimated loss directly and naturally resulting in the ordinary course of events from the breach of warranty. The rule so laid down excludes the element of the defendant's knowledge; his liability is to depend, not upon the state of his mind, but upon the facts of the case. Sulphuric acid is used for a great variety of purposes; among other purposes, it has been used largely, at all events since 1880, for the purpose of making glucose and invert to be used in brewing. Although the proportion of acid thus used for food products is small as compared with the quantity used for other purposes, yet the use of the acid for food products cannot be said to be other than a well-recognised and ordinary use. Although for many of the purposes to which sulphuric acid is applied the presence of arsenic in the acid is not prejudicial, yet, of course, the presence of arsenic in acid renders it wholly unfit to be used in the preparation of food products; and where acid is purchased on the condition that it should be commercially free from arsenic, and in reliance upon this condition the purchaser applies acid supplied to him by the seller to one of the ordinary purposes for which such acid is used—i.e., for the manufacture of food products—and the acid supplied contains arsenic, I think that the loss occasioned by rendering useless the material with which the acid was mixed for the purpose of making

(1) L. R. 3 C. P. 499.

foodstuffs is a loss directly and naturally resulting in the ordinary course of events from the breach of the condition or warranty that the acid should be commercially free from arsenic. It is very difficult to find authorities to throw light upon the meaning of the words "loss," "directly," and "naturally," "resulting, in the ordinary course of events, from the breach of warranty," because although there are a vast number of reported cases bearing upon the question of damages for breach of contract, yet most of them have been determined with regard to the damages supposed to have been in contemplation of the parties; and although that matter may still form an important factor in determining whether special damages are due under the second rule in *Hadley* v. *Baxendale* (1) or under s. 54 of the Sale of Goods Act, yet it seems to me that it is an element that has no place in considering the measure of damages laid down in sub-s. 2 of s. 53.

The judgment, however, of the Court of Exchequer in Ireland delivered by Palles C.B. in the case of *Wilson* v. *Dunville* (2) has, I think, a direct bearing upon the question. In that case the plaintiff purchased from the defendants, who were distillers, a quantity of grains warranted by the defendants as being good, sound, and merchantable, and as reasonably answering the description of distillers' grains. These grains were ordinarily used in feeding cattle, as the defendants knew, though the sale to the plaintiff was not expressly made for that purpose. The grains delivered to the plaintiff did not answer to the description, and they contained small particles of lead which had become accidentally intermixed with the grains during a fire which occurred at the defendants' premises, and the cattle that were fed with the grains were poisoned. It was held that the defendants were liable in damages for the value of the cattle. Although in that case it is stated as a fact that the defendants knew that grains were ordinarily used in feeding cattle, the decision of the Court seems to have been independent of that fact. The head-note states, I think, correctly the substance of the decision in the following words:

(1) 9 Ex. 341. (2) L. R. Ir. 6 C. L. 210.

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"For the purpose of rendering a defendant responsible for damages which in the ordinary course of things flow from a particular breach, it is unnecessary that the actual breach which ensued should have been within the contemplation of the parties." The Chief Baron, in delivering the judgment of the Court, after referring to the argument urged on the behalf of the defendants that the death of the cattle could not have been in the contemplation of the parties at the time of the contract as the probable result, and suggesting an answer to that argument, proceeds as follows (1): "But, for myself, I desire to base my judgment upon broader grounds. . . . For the purpose of rendering a defendant responsible for damages which in the ordinary course of things flow from a particular breach, it is unnecessary that the actual breach of contract which ensued should have been within the contemplation of the parties. . . . If the consequences result solely from the act in question, and an usual state of things, they are the ordinary and usual consequences of that act, and the defendants are liable. If the consequences flow, not from the defendants' act alone, or from the defendants' act operating upon an usual state of things, but from that act, and an exceptional state of circumstances, then a question of much difficulty (and one as to which the cases are not wholly consistent) would arise as to the effect on the defendants' liability of their knowledge, at the time of the contract, of such exceptional circumstances. Upon the discussion of this latter question, ... I do not propose to enter. It has no application here. The loss of the cattle did not arise from exceptional circumstances, but was a natural result of the ordinary use of the substance sold to the plaintiff as grains."

In *Cory* v. *Thames Ironworks Co.* (2) Blackburn J. says as follows: "I think it all comes round to this; the measure of damages when a party has not fulfilled his contract is what might be reasonably expected in the ordinary course of things to flow from the non-fulfilment of the contract, not more than that, but what might be reasonably expected to flow from the non-fulfilment of the contract in the ordinary state of things,

(1) L. R. Ir. 6 C. L. at p. 217. (2) (1868) L. R. 3 Q. B. 181, at p. 190.

and to be the natural consequences of it." In the present case in the ordinary course of events the acid would be used for one of the purposes for which sulphuric acid is ordinarily used—i.e., the making of glucose and invert, and the consequences directly and naturally resulting from the use of acid containing a virulent poison such as arsenic was to destroy and render valueless all the materials with which the acid was mixed for the purpose of making glucose and invert.

Randall v. *Raper* (1) was a case in which the defendant suffered judgment by default. The material facts are stated in the declaration, which charged that the defendant had sold to the plaintiff seed barley warranting it to be chevalier seed barley, yet the seed barley was not chevalier seed barley, and the plaintiffs being corn-factors, having purchased the seed barley of the defendant in the way of their trade for the purpose of reselling, did without having any knowledge of the said breach of warranty resell a portion of the same to the persons named in the declaration, and the plaintiffs so resold those portions to those persons respectively by warranting the same to be chevalier seed barley when in fact it was not chevalier seed barley, and those persons respectively, not knowing that fact, sowed the same on their lands as and for chevalier seed barley, and the same, not being chevalier seed barley, produced inferior crops of an inferior quality of barley, and thereby the purchasers respectively sustained and incurred damages by means and in consequence of the plaintiffs' said breaches of the said warranties to them so made by the plaintiffs, and by their sowing the said seed on the faith of the same being true, and the plaintiffs have become and are liable to compensate and make good to them respectively the damages by them so sustained as aforesaid. There is no allegation in the declaration that the defendants at the time when they sold the barley to the plaintiffs had any notice or knowledge that the plaintiffs bought the barley to be resold, or indeed that they had any notice or knowledge that the plaintiffs were corn-factors, although the fact that they were corn-factors is alleged in the declaration. It was held that in assessing the damage on the execution

(1) E. B. & E. 84.

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of a writ of inquiry the jury ought to include the amount to which they considered the plaintiff had become liable to his purchasers in respect of the difference of the crops. Erle J., in delivering judgment, said (1): "The warranty is that the barley sold should be chevalier barley. The natural consequence of the breach of such a warranty is that, the barley which has been delivered having been sown and not being chevalier barley, an inferior crop has been produced. This damage naturally results from the breach of warranty; and the ordinary measure of it would be the difference in value between the inferior crop produced and that which would have been produced from chevalier barley; that is not inconsistent with *Hadley* v. *Baxendale*." (2) In that case the Court, no doubt, concluded that in the ordinary course of things barley sold as seed barley would be sown, and when sown, if it were inferior barley, the direct and natural result would be an inferior crop, and the loss resulting from the inferior crop so became the proper measure of damages for the breach of warranty, quite irrespective of any question as to what was in the contemplation of the parties.

An observation made by Lord Herschell in the case of *Drummond* v. *Van Ingen* (3) was relied upon by the defendants' counsel. That was a case in which it was held that there was an implied warranty that the goods should be fit for use in the manner in which goods of the same quality and general character would be used; in other words, that goods described as "coatings" should be fit to be made into coats and other garments. The observation made by Lord Herschell was as follows (4): "It was urged for the appellants by the Attorney-General, in his able argument at the bar, that it would be unreasonable to require that a manufacturer should be cognizant of all the purposes to which the article he manufacturers might be applied, and that he should be acquainted with all the trades in which it may be used. I agree. Where the article may be used as one of the elements in a variety of other manufactures, I think it may be too much to impute to the

(1) E. B. & E. at p. 89.
(2) 9 Ex. 341.
(3) 12 App. Cas. 284.
(4) 12 App. Cas. at p. 293.

maker of this common article a knowledge of the details of every manufacture into which it may enter in combination with other materials. But no such question arises here. There seems nothing unreasonable in expecting that the maker of 'coatings' should know that they are to be turned into coats and other garments, and that he should further know what coatings will and what will not be capable of use for this purpose in the ordinary methods." I have quoted this observation of Lord Herschell because it was relied upon by the defendants, but it seems to me to have no bearing upon the points presented in the present case. The question in *Drummond* v. *Van Ingen* (1) was whether the defendant who supplied the goods knew the purpose for which they were required. No such question arises in the present case. In that case the question arose whether there was an implied warranty or condition as to the fitness for a particular purpose of the goods supplied. No such question arises under s. 13 of the Sale of Goods Act, 1893.

In my opinion the plaintiffs are entitled to recover, first, the whole price paid by them for the impure acid, because the acid being worthless to the plaintiffs there was an entire failure of consideration, and by virtue of s. 53, sub-s. 1 (*a*), Sale of Goods Act, where there is a breach of warranty by the seller, the buyer may set up against the seller the breach of warranty in extinction of the price: see *Poulton* v. *Lattimore*. (2) Second, the value of the goods that were rendered useless by being mixed with the poisonous acid at a time when the plaintiffs were ignorant of the poisonous character of the acid. That, I think, is a loss directly and naturally resulting in the ordinary course of events from the breach of warranty.

The claim of the plaintiffs for the loss of the goodwill of their business is not, I think, recoverable. It does not seem to me to be a loss directly and naturally resulting in the ordinary course of events from the breach of warranty. It did not arise directly from the act of the defendants, but arose from the act of the plaintiffs in selling the poisonous glucose and invert to brewers for use in the brewing of beer. The poisonous glucose and invert were not supplied by the defendants to the plaintiffs,

(1) 12 App. Cas. 284. (2) (1829) 9 B. & C. 259; 32 R. R. 673.

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but were manufactured by the plaintiffs; the damage to their credit arose, not directly from any act of the defendants, but arose from the act of the plaintiffs in manufacturing glucose and invert by means of poisonous acid, and selling the glucose and invert so made as fit to be used in the brewing of beer. In *Randall* v. *Raper* (1) there was an allegation in the declaration that the plaintiffs had been and were by means of the premises injured in their credit, in their said trade, and otherwise, and had been and were otherwise injured. And no doubt in point of fact the selling of inferior barley would tend to injure the credit of the plaintiffs in their trade as corn-factors, yet no one seems to have contended that the damages under that head were recoverable. So in *Fitzgerald* v. *Leonard* (2) it was held that damages for loss of trade could not be recovered.

Further, I think that the plaintiffs are not entitled to recover against the defendants the sums which the brewers to whom the plaintiffs sold the glucose and invert made from the poisonous acid are entitled to recover against them. I think the rule is correctly laid down in Smith's Leading Cases in the note to *Vicars* v. *Wilcocks* (3) that no liability is incurred in the ordinary case of a separate and distinct collateral contract with a third person uncommunicated to the original contractor or wrong-doer, although the non-performance of this contract may in one sense have resulted from the original wrongful act or breach of contract. In my opinion there are no special circumstances to entitle the plaintiffs to claim special damages under s. 54 of the Sale of Goods Act.

The damages, therefore, will be confined to the two items I have mentioned—(1.) the price paid for the impure acid; (2.) value of the goods spoilt by being mixed with the impure acid. I have not gone into the figures, but I understand they can easily be agreed upon.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Grundy, Kershaw, Samson & Co.*

Solicitors for defendants: *Helder, Roberts & Co., for Simpson & Co., Leeds.*

(1) E. B. & E. 84. (2) L. R. Ir. 32 C. L. 675.

(3) 2 Sm. L. C. 11th ed. p. 521.

F. O. R.

BAKER AND WIFE *v.* WICKS AND OTHERS.

1904
March 19.

Rates—Recovery of—Illegal Distress—Liability of Overseers for Act of Assistant Overseer.

A justices' warrant of distress for rates, which was addressed in the statutory form to the overseers and constables, was handed by one of the overseers to the assistant overseer, who was empowered by the terms of his appointment to perform all the duties of an overseer. The assistant overseer, purporting to act in the execution of the warrant, was guilty of an illegal and excessive distress:—

Held, that the overseers were not responsible for the act of the assistant overseer.

FURTHER CONSIDERATION before Lord Alverstone C.J. after trial without a jury at the Lewes Assizes.

The action, which was for illegal and excessive distress, was brought against three defendants, E. Wicks and W. E. Wright, the overseers of the poor for the parish of Ringmer, in the county of Sussex, and J. S. Webster, an auctioneer.

The plaintiff Daniel Baker was a farmer residing at Ringmer, who entertained an objection to the application of the rates to the support of voluntary or non-provided schools under the Education Act, 1902, and with the object of raising a public protest against the appropriation of any portion of the rates to that purpose refused in June, 1903, to pay the amount then due from him in respect of rates. On July 7 a distress warrant was issued by the justices in the statutory form (see the Distress for Rates Act, 1849 (12 & 13 Vict. c. 14), Sched. C 1 and C 2), addressed "To the overseers of the poor of the parish of Ringmer, in the county of Sussex, and to the constables of the East Sussex Constabulary, and to all other peace officers in the said county," commanding them to distrain the goods of Daniel Baker to satisfy the demand and costs. There was at this time an assistant overseer for the parish of Ringmer named Washer, who had been appointed by the vestry in 1892, and who, by the terms of his appointment, was empowered to perform all the duties of an overseer; and he had continued to hold that office ever since. The distress

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warrant was handed by the justices to a police constable; but the constable, acting apparently under instructions from the chief constable, declined to execute it, and handed it to the defendant Wicks, by whom it was in turn handed to the assistant overseer Washer for execution, with instructions to do the best he could and to be careful not to overstep his duty. On July 16 the plaintiff Daniel Baker paid to Washer the amount due from him for rates less 15*s*., which was computed to be the proportion of the rate appropriated to educational purposes, and continued his refusal to pay the said sum of 15*s*. Certain other ratepayers in the parish having also refused to pay the education rate, their names being included in the above-mentioned distress warrant, Washer proceeded to procure a bailiff to execute the warrant, and, being desirous of avoiding the employment for that purpose of a resident in the neighbourhood, he procured the defendant Webster, an auctioneer resident at Belper, in Derbyshire, to come down to Sussex to effect the distress. On September 3 Washer and Webster came to the plaintiffs' farm, and there, purporting to act under the warrant of distress, seized and removed from the premises upwards of 100*l*. worth of furniture to satisfy the claim of 15*s*. remaining unpaid on account of the rates. Washer and Webster were informed at the time, as was the fact, that the whole of the goods, with the exception of about 5*l*. worth, were the property of the female plaintiff Mrs. Baker, the residue only being the property of her husband. The defendants Wicks and Wright were not present when the goods were seized, nor did they authorize the seizure of Mrs. Baker's goods; indeed, the defendant Wright was abroad at the time, having left England on July 26. Washer removed the goods to a room which he had previously hired for a week for the purpose. Wicks, upon being informed of the seizure of the goods and of Mrs. Baker's claim to them, extended the hiring of the room where they were stored for a few days longer until he could satisfy himself of the genuineness of the claim. Shortly afterwards, being satisfied that the goods belonged to Mrs. Baker, he returned them to her with expressions of regret. The plaintiffs then brought their

action against the above-mentioned three defendants; but Washer was not made a party to the action.

Boxall, K.C., and *E. E. Humphreys*, for the plaintiffs. The defendants Wicks and Wright are responsible. The warrant was addressed to the overseers, and a duty was thereby imposed upon them to execute the order of the justices. The fact that they did not authorize Washer to commit the illegal acts which were done affords no defence. A distress for rates bears little resemblance to a distress for rent: it is rather in the nature of an execution; it can only be levied on the goods of the defaulting ratepayer, while the goods seized are taken in satisfaction and not merely as a pledge to compel payment: see per Lord Mansfield, *Hutchins* v. *Chambers*. (1) The overseers to whom a warrant of distress is addressed are in the same position as a sheriff who is required to levy under a fi. fa., and just as a sheriff who has delegated his authority to a subordinate officer is responsible for every illegal act committed by that officer under colour of the authority—*Gregory* v. *Cotterell* (2)—so the overseers, if they delegate the performance of their duty under a distress warrant to an assistant overseer, are responsible for any misconduct on his part in the execution of the warrant. They have no power to delegate their authority in such a way as to relieve themselves of responsibility. No doubt, under the provisions of 59 Geo. 3, c. 12, s. 7, and 7 & 8 Vict. c. 101, s. 61, the vestry may empower the assistant overseer to execute all the duties of the office of overseer of the poor; and here they did in fact so empower him. But the warrant was not addressed to the assistant overseer, and in acting in the execution of the warrant he must have been acting as the bailiff of the overseers. There is a good reason for not addressing the warrant to the assistant overseer, in that he is not an equally responsible person with the overseers. By the 43 Eliz. c. 2, s. 1, the overseers of the poor are to be "substantial householders," whereas by the Poor Relief Act, 1819 (59 Geo. 3, c. 12), s. 7, the assistant overseer is only required to be a "discreet person." At any rate, the defendant

(1) (1758) 1 Burr. 579.

(2) (1855) 5 E. & B. 571.

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Wicks is liable, for by extending the period for which the store-room was hired after notice of Mrs. Baker's claim he ratified and adopted Washer's acts.

Avory, K.C., and *Lawless*, for the defendants Wicks and Wright. It is conceded that a distress for rates is in effect an execution, but there is this distinction between the case of overseers and that of a sheriff—that, whereas the sheriff's officer derives his authority solely from the sheriff, and has no independent authority of his own, the assistant overseer has an independent authority attaching to the office to which he has been appointed by the vestry or parish council, and which is recognised by statute. The assistant overseer "is not the servant of the churchwardens and overseers of the parish, but of the vestry, from whom he directly receives his authority": per Lord Denman, *Reg.* v. *Watts*. (1) "The acts done by him are not to be considered as done by him as the agent of the other overseers, but as done by virtue of his own authority derived from the appointment of the vestry": per Coltman J., *Points* v. *Attwood*. (2) He is a responsible officer, and has to give security for the faithful execution of his office: 59 Geo. 3, c. 12, s. 7. If the plaintiff is right in contending that the mere fact of the warrant being addressed to the overseers renders them liable for the manner of the execution in the same way that a sheriff would be liable, then the constables of East Sussex would equally be liable, for the warrant is also addressed to them, and it was to one of the constables that it was in fact handed in the first instance. Further, the justices in addressing the warrant to the overseers must be taken to have included under that title an assistant overseer empowered to perform all their duties.

Assuming that the overseers are not liable merely by reason of their being the addressees of the warrant, Wicks did not, by handing the warrant to Washer for execution, make Washer his agent in such a way as to render himself liable for the illegal manner in which it was executed. His position could not be worse than that of a judgment creditor handing a fi. fa

(1) (1837) 7 A. & E. 461, at p. 469; 45 R. R. 753.
(2) (1848) 6 C. B. 38, at p. 49.

to a sheriff, and it is well settled that in such a case the creditor, in the absence of a special direction, is not liable for the acts of the sheriff in seizing the wrong person's goods: *Smith* v. *Keal* (1); *Morris* v. *Salberg*. (2) With regard to the alleged ratification by Wicks, there is here no evidence of any ratification in fact, for he was entitled to a reasonable time to satisfy himself of the ownership. And even if there were it would make no difference, for *Woollen* v. *Wright* (3) is a distinct authority that in such a case, where the wrongful act has been done without authority, a subsequent ratification is of no effect.

Lailey, for the defendant Webster.

Boxall, K.C., in reply. The cases of *Reg.* v. *Watts* (4) and *Points* v. *Attwood* (5) are not authorities against the plaintiffs, for the dicta in them which are relied on were only obiter.

LORD ALVERSTONE C.J. I cannot help regretting that Mr. Baker was not better advised as to the absurdity of raising in this manner his objection to the rate for educational purposes. He might have raised it with at least equal dignity by simply paying the money under protest. Still more do I regret that the police should have refused to execute the warrant. Why they refused I am at a loss to understand. It was their duty to execute it, and had they discharged that duty this trouble would never have arisen.

The action is brought against the two overseers and a bailiff. At the material dates the overseers of the parish were the defendants Wicks and Wright, and there was also an assistant overseer named Washer, who was appointed in 1892 to execute and perform all the duties of an overseer, and at the time of the acts complained of was acting under that appointment.

The distress warrant the execution of which forms the subject of this action was at the time of the execution an effective warrant for the sum of 15*s*. and no more. Washer and Webster, the bailiff employed by him, purporting to act

(1) (1882) 9 Q. B. D. 340.
(2) (1889) 22 Q. B. D. 614.
(3) (1862) 1 H. & C. 554.
(4) 7 A. & E. 461, at p. 469; 45 R. R. 753.
(5) 6 C. B. 38, at p. 49.

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under the warrant, seized 100*l.* worth of goods. Such a seizure was in the highest degree improper and excessive, and most unjustifiable; added to which it was illegal in that they seized the wrong person's goods.

It is sought to hold the two overseers responsible for these illegal acts on the part of Washer and the bailiff Webster. The warrant was addressed to the overseers, and it has been contended on behalf of the plaintiffs that the fact of its being so addressed imposed upon the overseers a duty which they could not get rid of by delegating the execution of it to third persons, and that they were in a position similar to that of a sheriff acting under a fi. fa., who is responsible for any illegality committed by his officers in executing the writ. I agree that if Mr. Boxall had been able to make good his position that the cases of the overseers and the sheriff are precisely analogous, he would have succeeded in establishing the liability of the overseers in the present case. But there is this important distinction between the two cases—that the assistant overseer, unlike the sheriff's officer, has an independent statutory authority, and is recognised by the Legislature as a person who may perform all the duties of an overseer. I agree that the cases cited of *Reg.* v. *Watts* (1) and *Points* v. *Attwood* (2) are not direct decisions that the assistant overseer is not the servant of the overseers, but the dicta to that effect are stated in the clearest and strongest terms, and lay down an intelligible principle upon which I feel bound to act. There will be judgment for the defendants Wicks and Wright, and against the defendant Webster.

Judgment for the overseers.

Solicitor for plaintiffs: *D. A. Davies, Hove.*

Solicitors for Wicks and Wright: *Beal & Payne, for E. Bedford, Newhaven.*

Solicitors for Webster: *Needham, Tyer & Barrow, for E. G. & F. J. Jackson, Belper.*

(1) 7 A. & E. 461, at p. 469; 45 R. R. 753. (2) 6 C. B. 38, at p. 49.

J. F. C.

ATTORNEY-GENERAL *v.* EARL OF LONDESBOROUGH.

1904
March 7.

Revenue—Estate Duty—Exemption—Settlement of Personal Property—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 21, *sub-s.* 1.

By the Finance Act, 1894, s. 21, sub-s. 1, "Estate duty shall not be payable on the death of a deceased person in respect of personal property settled by a will or disposition made by a person dying before the commencement of this part of the Act, in respect of which property" probate duty (among other specified duties) "has been paid."

Under the will of a testator who died in 1849, his residuary personal estate became vested in trustees upon trust to invest it in land and to hold the same in trust for two persons in succession for life, with remainder to the defendant in tail male. Probate duty was paid on the testator's personalty. On the death of the second tenant for life in 1900, estate duty was claimed in respect of the land, then subject to the trusts of the will, which represented the residuary personal estate of the testator:—

Held, that estate duty was payable; that s. 21, sub-s. 1, did not apply, because at the date of the death in respect of which estate duty was claimed the settled property was not personal property.

INFORMATION by the Attorney-General claiming estate duty.

The information and the answer of the defendant disclosed the following facts: William Joseph Denison, by his will dated August 3, 1848, devised all his real estate to the use of his nephew, Lord Albert Denison Conyngham, for his life, with remainder to the use of William Henry Forester Conyngham, the eldest son of his said nephew, for his life, with remainder to the use of the first and every other son of the last named severally, successively, and in remainder one after another in tail male, with divers remainders over; and the testator by his said will bequeathed all his personal estate, not thereby otherwise disposed of, to trustees upon trust to convert the same into money, and after payment of debts and legacies to invest the residue of the money in the purchase of real estate, and to settle the same upon the same trusts as were in the will expressed concerning the testator's real estate.

The testator died on August 3, 1849, and his will was duly proved, and probate duty was paid.

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The trustees of the will invested the residue of the personal estate in the purchase of hereditaments which were duly conveyed to the uses of the testator's will.

Soon after the death of the testator, Lord Albert Conyngham assumed the name of Denison. In 1850 he was created Baron Londesborough, and on January 15, 1860, he died. His eldest son, the said William Henry Forester Conyngham, thereupon succeeded to the title of Baron Londesborough, and also as tenant for life to the estates devised by and subject to the uses and trusts declared by the testator's will, including the estates purchased with the residuary personalty of the testator.

The defendant was the eldest son of the second Lord Londesborough.

On May 18, 1886, a disentailing deed and a deed of resettlement, to both of which the defendant and his father were parties, were executed, by which certain real estate, including the estates purchased with the residuary personalty of the testator, were resettled in trust for the defendant's father for life by way of continuation and confirmation of the former life estate limited to him by the will, and after his death as to one part to the defendant for life and then to his first and other sons in tail male, and as to the other part to the defendant in fee simple.

The second Lord Londesborough (who in 1887 had been created Earl of Londesborough) died on April 13, 1900, when the defendant succeeded in possession to the estates and title.

The claim for estate duty as first formulated on behalf of the Commissioners of Inland Revenue was to estate duty in respect of so much only of the property comprised in the indenture of resettlement of May 18, 1886, as was either then brought into settlement by the late Earl, or derived from the real estate and foreign assets given by the will, and an account was accordingly brought in on behalf of the defendant on this basis. Subsequently a claim was further made by the Commissioners for estate duty in respect of the whole of the property included in the resettlement.

The defendant contended that he was entitled to exemption,

under s. 21, sub-s. 1, of the Finance Act, 1894 (1), from estate duty in respect of that portion of the real estate which was derived from the investment in land of personal estate upon which probate duty (which is one of the duties referred to in s. 21, sub-s. 1) had been paid under the will of William Joseph Denison.

The Commissioners contended, and the reason assigned for the new claim was, that the disposition under which the property passed on the death of the late Earl was the resettlement, and that the disponer of the estates upon which the question in suit arose was the defendant, so that s. 21, sub-s. 1, of the Finance Act, 1894, had no application; but, as will be seen, the claim of the Commissioners was not put upon this ground at the hearing.

The informant, on behalf of His Majesty, prayed as follows: That it might be declared that upon the death of the Earl of Londesborough estate duty became payable on the principal value of the whole of the property passing under the indenture of resettlement of May 18, 1886, including property which had arisen from the investment in land of personal estate of William Joseph Denison in respect of which probate duty had been paid as part of the estate and effects of the said Denison.

Sir R. B. Finlay, A.-G., Sir E. Carson, S.-G. (*Vaughan Hawkins* with them), for the Crown. The only question for decision is whether the defendant is entitled to claim exemption under s. 21, sub-s. 1, of the Finance Act, 1894, from the payment of estate duty in respect of that part of the property which represents personalty on which probate duty was paid on the death of Mr. Denison before the Act of 1894 came into force.

(1) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 21, sub-s. 1: Estate duty shall not be payable on the death of a deceased person in respect of personal property settled by a will or disposition made by a person dying before the commencement of this Act, in respect of which property any duty mentioned in paragraphs 1 and 2 of the First Schedule to this Act, or the duty payable on any representation or inventory under any Act in force before the Customs and Inland Revenue Act, 1881, has been paid, or is payable, unless in either case the deceased was at the time of his death, or at any time since the will or disposition took effect had been, competent to dispose of the property.

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[CHANNELL J. Is any point raised as to the effect of the resettlement of May 18, 1886?]

No. It is not proposed to argue any point as to that. For the purpose of determining the amount of estate duty payable in this case, the settlement in force at the death of the defendant's father is treated as a sort of compound settlement, consisting of Mr. Denison's will plus the resettlement in 1886. The question, therefore, depends entirely on the language of s. 21, sub-s. 1. That section, it is submitted, applies only to a case of property which is personal property at the time of the transmission on death on which estate duty is claimed. This property was personalty at the date of the death of the testator; but by the terms of his will it was left in trust to be invested in realty, and it was so invested, and it thereupon ceased to be personalty. The section, therefore, has no application to the facts of this case. It is true that the property in its present form is the proceeds of personal property on which probate duty has been paid; but however reasonable it might be that there should be an exemption in a case of this kind, the Court, as has been frequently said in these cases, has only to give effect to the language of the Act; and the plain words of this section import that the exemption only applies where the property is personalty both at the time when the probate duty was paid before the Act and also at the time of the death on which the estate duty is claimed. There does not appear to be any authority on the point.

Danckwerts, K.C., and *Bridgeman*, for the defendant. The argument for the Crown is based entirely upon the fact that at the time of the death of the defendant's father this property was land. It is admitted that if it had been personalty, s. 21 would apply. Suppose money is left in trust with power to invest it in land, the argument would equally apply; and the liability to duty would depend upon the accidental circumstance of whether or not the money happened to be invested in land at the date of the death of the tenant for life. In the will in question there is a power to sell the settled land and to reconvert it into money on trust to reinvest in land. If at the time of the death the property had under this power been reconverted

into personalty, according to the argument for the Crown no estate duty would have been payable. The object of the Finance Act, 1894, was to do away with the inequality which had previously existed between realty and personalty in the matter of duties payable on death. This was effected by imposing the estate duty upon both classes of property. Before the Act the only duties analogous to the estate duty were the probate duty and the account duty, and they were payable on personal property only. In the case of property, real or personal, settled after the Act, s. 5, sub-s. 2, provides that when once estate duty has been paid it is not payable again, no matter how many deaths occur, until the death of some one who is competent to dispose of the whole property. The object of s. 21, sub-s. 1, was to place property which had been settled before the Act and had borne the only duty analogous to estate duty on the same footing as though the death had occurred after the Act: *Attorney-General* v. *Dodington* (1), per Rigby L.J.; *Inland Revenue Commissioners* v. *Priestley* (2); and hence the reference to probate duty and account duty, which were the only duties which could come in question. It is clear, therefore, that the section is only dealing with personal property which had been settled before the Act, and on which probate duty had been paid. The word "personal" is introduced to identify the circumstances under which probate duty or account duty would have been paid before the Act. If the property was personalty at the date of the will or settlement, it is immaterial that it may have subsequently become realty. The date of the settlement is the only date to be considered. Otherwise the object of s. 21 would be defeated in every case where there was a power or a trust to invest personalty in real estate, and it happened at the death to be so invested. The natural construction of the language of s. 21, sub-s. 1, is in the defendant's favour. This is, "personal property settled by a will." The Crown read that as if it were "settled under a will."

[CHANNELL J. "Settled" means which is under the operation of a settlement, not that which at some time past has

(1) [1897] 2 Q. B. 373, at p. 383. (2) [1901] A. C. 208; [1900] 2 Ir. R. 281.

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been settled. Otherwise, where property has once been under a settlement, the exemption might be claimed for all time.]

That would be covered by the proviso at the end of the sub-section. "Settled by" means that at the time the will or disposition operated the property was personalty; "under" means that it may have been personalty then or at some subsequent period.

[CHANNELL J. I do not think that an argument can be founded on a distinction between the words "by" and "under" in this connection.]

If there is any doubt as to the construction of the section, the Court should lean to that side which imposes the least burden upon the subject: *Solicitor-General* v. *Law Reversionary Interest Society*. (1)

Sir R. B. Finlay, A.-G., in reply. The authorities cited do not in any way bear on the question as to the meaning of the word "personal" in s. 21, sub-s. 1; and arguments as to the object of the Act and as to the lighter burden cannot override the plain language of the Act. If the contention of the defendant be correct, the word "personal" in this sub-section is superfluous and unnecessary; it would have been sufficient to have said "property settled."

CHANNELL J. I think that in this case my judgment must be for the Crown. I quite appreciate Mr. Danckwerts' argument and the proposition of Rigby L.J. in *Attorney-General* v. *Dodington* (2), and I have no doubt that the object of s. 21 was to give to settled property, on which the duties mentioned in the section have been paid before the Act came into operation, an exemption from the payment of further duty of a similar kind during the continuance of the settlement. But one has to consider whether that object has been carried out in all cases, and in order to do so it is necessary to be guided by the language of the Act of Parliament. It is possible that if the case of property which was personalty at the time of the settlement and which had become converted into realty at the time of the death in question had been contemplated by the Legislature,

(1) (1873) L. R. 8 Ex. 233. (2) [1897] 2 Q. B. 373, at p. 383.

different language would have been used, and that the same exemption would have been given in the case of property of that kind as was given to property which was personalty at the time of the settlement, and remained personalty all through the settlement. It is possible that that might have been done. On the other hand, it is possible that it might not, because I think as a matter of history that this Act was to a certain extent directed against landed property, and that there was some intention to bring land into taxation in a way which it had not been before. Therefore it does not follow that the Legislature would, if they had had the case in their direct contemplation, have provided, in the way in which Mr. Danckwerts suggests they have in fact provided, for the case of property which was personalty at the time of the settlement, and had become converted into realty at the time when the question arose as to whether it should pay estate duty on a particular death. But it is necessary really to decide all questions of this sort by the language which has been used in the Act. Again, in reference to the principle that one is to lean to the lighter burden, I myself very seldom find those principles of much assistance to me; but in this particular case the duty is undoubtedly imposed by the operative words of the Act of Parliament, and the question is whether it comes within the exception; and in reference to that I think different considerations might apply. As an ordinary rule the onus is upon the person who says that a particular case comes within an exception to shew that that is so. Possibly that may be a sufficient answer to this argument, which, however, is one that seldom appeals to me very much. I come, therefore, to consider the actual words of this section: "Estate duty shall not be payable on the death of a deceased person in respect of personal property settled by a will," &c. In the course of the argument I dealt with the suggested difference between the words "by" and "under," and I think that the section clearly is referring to personal property which is at the time of the death governed by a settlement, and which passes on that death by virtue of the operation of the settlement. It must mean property (at present I leave out the word "personal") which is under the operation of a settlement, and not property

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which has at some time past been in fact settled by some instrument. It cannot mean the latter, because otherwise it would give property on which probate duty had been paid immunity for all time in respect of all future deaths, whether they occurred during the time of the continuance of the settlement or not. That cannot possibly be the meaning of the section. It is true that the majority of cases which would arise of that kind are provided for by the last paragraph of the section, which begins with the word "unless"; but not every possible case would be. I think, therefore, that the section means personal property which is at the time of the death under the operation of the settlement. Then if so, that is the time which one has to look at to see whether the property is personal or not. The exemption is not given, according to that reading, in respect of real property. Again, if the other construction is correct, namely, that the word "personal" is merely introduced because the only property in respect of which the duties afterwards mentioned, namely, the probate duty and account duty were payable, was personal property, it was unnecessary to introduce it at all. I agree that is not a very strong argument, because it does happen sometimes that words are introduced, as was pointed out by Rigby L.J., in reference to something in the other sections of this Act for the sake of clearness But unfortunately the introduction of this word, if put in for the sake of clearness, has had a very different operation. In my opinion these words are too strong to enable me to accept the argument for the defendant, although I quite accept it in principle as indicating what was probably the intention of the Legislature when this section was enacted. They have, however, used words which go beyond that intention, if that was their intention. I give judgment for the Crown.

Judgment for the Crown.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitors for defendant: *Royds & Rawstorne.*

F. O. R.

MOUNT LYELL MINING AND RAILWAY COMPANY, LIMITED *v.* COMMISSIONERS OF INLAND REVENUE.

1904
March 10.

Revenue—Stamp Duty—"Marketable Security"—Debenture Bond—"Given in Substitution for a like Security"—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *Sched. I.*

The appellant company, incorporated under the laws of Victoria, was formed to take over the assets and liabilities of two existing companies, one of which was a company registered in England having an issue of debentures. The holders of these debentures by agreement delivered them up, and accepted in lieu thereof debentures of an equivalent amount issued by the appellant company:—

Held, that the debentures of the appellant company were not "given in substitution for a like security" within the meaning of sub-head 4 of the heading "Marketable Securities" in the First Schedule to the Stamp Act, 1891, and were therefore liable to bear stamp duty to the full amount.

CASE stated by the Commissioners of Inland Revenue pursuant to s. 13 of the Stamp Act, 1891.

The facts stated in the case were as follows:—

On October 12, 1903, an instrument was presented on behalf of the Mount Lyell Mining and Railway Company, Limited (hereinafter called the appellant company), to the Commissioners of Inland Revenue under the provisions of s. 12 of the Stamp Act, 1891, for the opinion of the Commissioners as to the stamp duty with which the instrument was chargeable.

In 1899 the North Mount Lyell Copper Company, Limited (hereinafter called the North Company), being a company registered under the Companies Acts, 1862 to 1893, issued under the seal of the company a series of debentures of varying amounts, whereby they promised to pay to bearer, or, when registered, to the registered holder, the respective amounts thereof. In order to secure such debentures a trust deed was on December 7, 1898, executed between the North Company of the one part, and General Sir Hugh Gough and William Jacks (as trustees for the debenture-holders) of the other part, containing the conditions usual in such trust deeds.

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MOUNT LYELL MINING AND RAILWAY COMPANY v. INLAND REVENUE COMMISSIONERS.

By an agreement dated May 22, 1903, made between a company called the Mount Lyell Mining and Railway Company, Limited (being a company registered under the laws of the State of Victoria) of the one part, and the North Company of the other part, it was provided that a new company should be incorporated to take over the assets and liabilities of the companies parties thereto, including the liability of the North Company to the debenture-holders, to whom debentures in the new company were to be given as therein provided. By a subsidiary agreement dated June 18, 1903, made between Daniel James Mackay (on behalf of all the holders of the outstanding debentures of the North Company) of the one part, and the North Company of the other part, it was (amongst other things) provided that every holder of debentures of the North Company should deliver up the debentures held by him and accept in lieu thereof debentures of an equivalent amount in the new company to be formed as aforesaid; such debentures were to be framed and secured as therein mentioned, and by clause 5 the delivery of such substituted debentures was to be accepted in satisfaction of the liability of the North Company to him under the said debenture trust deed and debentures.

By an agreement dated August 6, 1903, and made between the aforesaid Mount Lyell Mining and Railway Company, Limited, of the State of Victoria of the first part, the North Company of the second part, and Alfred Mellor, on behalf of a new company which it was contemplated should be formed under the laws of the State of Victoria, under the style of the Mount Lyell Mining and Railway Company, Limited (the appellant company) of the third part, it was agreed to sell the respective undertakings of the old companies to the appellant company when incorporated, and as to the assets of the said North Company subject to the existing mortgage debentures to be satisfied by the issue of debentures of the appellant company as therein provided.

On August 11, 1903, the appellant company was duly incorporated under the laws of the State of Victoria, in the Commonwealth of Australia, and by deed of that date it duly adopted under seal the last-mentioned agreement.

A holder of one of the above-mentioned debentures issued by the North Company surrendered such debenture at the office of the appellant company in London, and in lieu thereof received the debenture under the seal of the appellant company which was the subject of adjudication. In accepting such new debenture he acted under the agreement of June 18, 1903, and he thereby released and gave up all right against the North Company and all rights in respect of the first-mentioned debenture. The appellant company contended that the instrument in question fell to be charged only with substituted security duty at the rate of 6*d.* for the every 20*l.* thereof.

The Commissioners, being of opinion that the instrument in question was a marketable security, being a security transferable by delivery, and bearing date after August 6, 1885, by reference to the heading "Marketable Security," sub-head 3, in the First Schedule to the Stamp Act, 1891 (1), and that it was not within the fourth sub-head of that heading, assessed the duty at 1*s.* for every 10*l.* and for every fractional part of 10*l.* of the money thereby secured. The appellants being aggrieved at the decision, the Commissioners, at the request of the appellants, stated this case for the opinion of the Court.

The questions for the opinion of the Court were: (1.) Whether the assessment of the Commissioners was correct. (2.) If not, to what duty the instrument was liable.

W. F. Hamilton, K.C., and *Elgood*, for the appellants. The facts of this case bring it within sub-head 4 of the heading "Marketable Security" in the schedule to the Stamp Act, 1891, and the lower duty is therefore payable. The debenture of the appellant company is a security "given in substitution for," that is, given or taken in the place of, "a

(1) Stamp Act, 1891 (54 & 55 Vict. c. 39), First Schedule: "Marketable Security."—(3.) "Marketable security (except a Colonial Government security) being a security transferable by delivery and bearing date or signed or offered for subscription after August 6, 1885.—For every 10*l.* and also for any fractional part of 10*l.* of the money thereby secured—1*s.*" Sub-head 4: "Marketable security (except a Colonial Government security) being such security as last aforesaid given in substitution for a like security duly stamped in conformity with the law in force at the time when it became subject to duty.—For every 20*l.* and also for any fractional part of 20*l.* of the money thereby secured —6*d.*"

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like security," which means a security of the same character. It is immaterial that the debentures are not debentures of the same company. A security is given in substitution for another when there is a change of debtors as well as a change of the instrument itself.

[They referred to *City of London Brewery Co.* v. *Commissioners of Inland Revenue.* (1)]

Sir R. B. Finlay, A.-G., and *Rowlatt*, for the Crown. This is not a case of a security given in substitution for a like security. What has happened is that the debenture-holders in an English company have given up the security of the English company and have taken in exchange a totally different security, namely, the debentures of a Victorian company. Sect. 82, sub-s. 1, of the Stamp Act, 1891, shews that English and Colonial securities are placed on a different footing as regards their liability to be stamped. The substitution of one security for another necessarily implies that the debtor remains the same. If a new debtor is taken in the place of an old one, it is not a case of substitution but of novation. Where the debtor remains the same, there is a good reason why the new security taken in the place of one which is given up, on which the full stamp duty has been paid, should not be liable to the same duty over again; but that reasoning does not apply if a new debtor is brought into existence. The words "given in substitution" cannot be construed to mean the same as "taken in substitution"; the former imply that the same company issues both securities, the latter do not.

Hamilton, K.C., in reply. Sect. 82 only defines marketable securities; it does not deal with the question as to what stamp duty is payable. The amount of the duty is the same for Colonial as for English securities.

CHANNELL J. In this case I do not desire to decide any questions which are not necessary for the determination of the case before me. There are some portions of the Attorney-General's argument which I am not prepared to accept without further consideration. It may be that I have formed an erroneous view as to what is the meaning of the word

(1) [1898] 1 Q. B. 408; [1899] 1 Q. B. 121.

"substitution" in the schedule to the Stamp Act. I gave my opinion in the *City of London Brewery Co.* v. *Commissioners of Inland Revenue* (1), and my decision on this point in that case was reversed on appeal, and it may be that I do not fully appreciate the grounds of the decision in the Court of Appeal on this point, which is dealt with very shortly, the other points on which the Court of Appeal agreed with the Court below being dealt with at length in the judgments. Consequently I do not propose to give any decision on the argument of the Attorney-General founded upon the alleged distinction between giving in substitution and taking in substitution. For the purpose of deciding this case it is not in my view necessary to do so. The language of the schedule to the Stamp Act is "a marketable security, except a Colonial Government security, being such security as last aforesaid given in substitution for a like security." It seems to me that the words "a like security," occurring where they do in the Stamp Act, mean a security which is like the one referred to for the purpose of stamping, and when one sees (which is what I did not fully appreciate in the first instance) that one of the debentures in question in this case is a debenture of an English company and the other of a Colonial company, and that under s. 82 the considerations under which they become liable to a stamp are not the same (although the amount of the stamp to which they are liable is the same), it seems to me that there is a difficulty in holding that the one security is a like security with the other for stamp purposes. On this ground I think I must hold that this is not a substituted security. I say nothing about the other points one way or the other, as it is not necessary for the decision of this case. The decision of the Commissioners was right, and the appeal must be dismissed.

Judgment for the Crown

Solicitors for appellants: *James White & Leonard*
Solicitor for the Crown: *Solicitor of Inland Revenue*

(1) [1898] 1 Q. B. 408; [1899] 1 Q. B. 121.

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[IN THE COURT OF APPEAL.]

ATTORNEY-GENERAL *v.* DUKE OF NORTHUMBERLAND AND OTHERS.

Revenue — Succession Duty — Tenant for Life — Remainder in Tail—Disentailing Deed—Appointment to Purchaser in Fee—Alienation—Succession derived from Alienee—Succession Duty Act, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 15.

In 1868 the tenant for life of real estate and the tenant in tail in remainder joined in the execution of a disentailing deed by which the property stood limited to such uses as they should by deed jointly appoint. In 1870 they sold a portion of the land to a purchaser, to whom they jointly appointed and conveyed it. In 1874 the purchaser died, having devised the land to his wife, who died in 1888, after devising it to her daughter; and the daughter paid succession duty on the value of her interest considered as an annuity. In 1899 the tenant for life died:—

Held, affirming the judgment of Ridley J., that upon the death of the tenant for life succession duty in respect of the succession of the tenant in tail became payable, notwithstanding the alienation of the succession and the disposition of the property by the alienee: and that the duty must be calculated on the value of the interest considered as an annuity by reference to the daughter's life.

Decision on construction of s. 15 of the Succession Duty Act, 1853, in *In re Cooper and Allen* to *Harlech*, (1876) 4 Ch. D. 802, overruled.

Solicitor-General v. *Law Reversionary Interest Society*, (1873) L. R. 8 Ex. 233, followed.

APPEAL by the defendants from the judgment of Ridley J. (1) on an information by the Attorney-General claiming succession duty.

In the year 1816 certain estates in Northumberland and Middlesex (including the land comprised in the indenture of December 1, 1870, hereinafter referred to) stood limited to the use of Hugh, second Duke of Northumberland, for life with remainder to the use of his eldest son, afterwards third Duke, in tail male; and by virtue of two common recoveries suffered in 1816 and of indentures of lease and release in January, 1817, these estates became limited to such uses as the second Duke and his eldest son should jointly appoint.

(1) [1903] 2 K. B. 71.

By an indenture of settlement dated April 19, 1817, the second and third Dukes exercised their joint power of appointment, and limited the estates to uses under which, by reason of the events which happened, the estates in the year 1868 stood limited (subject to a term of years since satisfied) to the use of Algernon George, sixth Duke, for life with remainder to his eldest son, afterwards and now the seventh Duke and one of the defendants, in tail male.

By an indenture dated December 19, 1868, duly enrolled as a disentailing assurance, the sixth and seventh Dukes disentailed the estates and conveyed them to such uses as the sixth and seventh Dukes should by deed jointly appoint, and, in default thereof, to the uses then subsisting under or by reference to the settlement of 1817.

By an indenture of settlement dated December 21, 1868, the sixth and seventh Dukes, in exercise of the joint power of appointment given to them by the indenture of December 19, 1868, appointed the estates to such uses as they should jointly appoint by deed, and, in default thereof, to the use of the sixth Duke for life, with remainder to the use of the seventh Duke for life, with remainder to the use of his first and other sons successively in tail male, with divers remainders over in strict settlement.

By indenture dated December 1, 1870, which recited (inter alia) the joint power of appointment in the settlement of December 21, 1868, the sixth and seventh Dukes, in exercise of that power and in consideration of the sum of 250*l.*, irrevocably appointed a certain parcel of land, being a portion of the estates, to the use of Lord James Murray in fee simple.

On June 3, 1874, Lord James Murray died, having by his will devised all his real and personal estate to his wife, Lady Elizabeth Murray, who was his sole executrix.

On October 11, 1888, Lady Elizabeth Murray died seised of the parcel of land, which she devised by her will to her daughter, the defendant Caroline Frances Murray, whom she appointed sole executrix. On the death of Lady Elizabeth Murray succession duty at 1½ per cent. was paid on the value of the interest of the defendant Caroline Frances Murray (considered as an

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annuity for life) in the real estate so devised to her by Lady Elizabeth Murray, including the land assured by the indenture of December 1, 1870.

By an indenture of settlement dated July 1, 1892, the sixth and seventh Dukes appointed the family estates to such uses as they and the present Earl Percy (the eldest son of the seventh Duke) should by deed jointly appoint; and by a further indenture of settlement, dated December 19, 1894, the sixth and seventh Dukes and Earl Percy appointed the estates to such uses as the seventh Duke and Earl Percy should by deed jointly appoint, and in default of appointment to the use of the seventh Duke for life with divers remainders over.

The sixth Duke died on January 2, 1899.

By an indenture dated May 13, 1902, the defendant Caroline Frances Murray sold and conveyed the particular land in question to the defendant Charles William Bell, who is now its owner. (1)

The information prayed for a declaration that succession duty under the Succession Duty Act, 1853, and the Customs and Inland Revenue Act, 1888, became payable on the death of the sixth Duke in respect of the land assured by the indenture of December 1, 1870, at the rate of 6½ per cent., that is to say, 5 per cent. under s. 10 of the Succession Duty Act, 1853, the present Duke being a descendant of a brother of the father of the third Duke, and 1½ per cent. under s. 21, sub-s. 1, of the Customs and Inland Revenue Act, 1888. The information further asked that the duty should be assessed on the principal value of the property by virtue of s. 18 of the Finance Act, 1894; but it was not contended during the argument in the Court below that this section applied, and it was asked on behalf of the Crown that the duty should be calculated on the value of the interest considered as an annuity under s. 21 of the Succession Duty Act, 1853. (2)

(1) Bell was joined as a defendant for the purpose of enforcing the charge upon the property.

(2) By s. 2 of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), 'Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, either

Ridley J. gave judgment for the Crown, holding that upon the death of the sixth Duke succession duty in respect of the succession of the seventh Duke became payable, notwithstanding the alienation of the succession and the disposition of the property by the alienee.

March 2, 3, 5. *Haldane*, *K.C.*, and *Danckwerts*, *K.C.* (*Austen-Cartmell* with them), for the defendants. The only succession duty payable in this case was that paid by Miss Murray in respect of the new succession on the death of her mother. By the Succession Duty Act, 1853, s. 1, the term "succession" denotes any property chargeable with duty under the Act. By s. 20 of the Act the duty only becomes

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immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a 'succession'; and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote the settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived."

By s. 15, "Where, at the time appointed for the commencement of this Act, any reversionary property expectant on death shall be vested, by alienation or other derivative title, in any person other than the person who shall have been originally entitled thereto under any such disposition or devolution as is mentioned in the second section of this Act, then the person in whom such property shall be so vested shall be chargeable with duty in respect thereof as a succession at the same time and at the same rate as the person so originally entitled would have been chargeable with if no such alienation had been made or derivative title created; and where, after the time appointed for the commencement of this Act, any succession shall, before the successor shall have become entitled thereto or to the income thereof in possession, have become vested by alienation or by any title not conferring a new succession in any other person, then the duty payable in respect thereof shall be paid at the same rate and time as the same would have been payable if no such alienation had been made or derivative title created; and where the title to any succession shall be accelerated by the surrender or extinction of any prior interests, then the duty thereon shall be payable at the same time and in the same manner as such duty would have been payable if no such acceleration had taken place."

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payable when the successor becomes entitled in possession. The duty is in substance a duty on each new possession by virtue of a succession. The argument for the Crown involves that two duties are payable in respect of one possession. It is submitted that is not so. Whether there have in this case been two successions by the seventh Duke and Miss Murray respectively or not, there has only been one possession, and it is in respect of that alone that duty is payable. Sect. 15 of the Act deals with cases in which a succession has become vested by alienation or other derivative title not conferring a new succession in any person other than the person who was originally entitled thereto by virtue of a disposition conferring a succession under s. 2. It is submitted that, upon the true construction of s. 15, where there has been an alienation or any other derivative title, which has conferred a new succession before the duty became payable on the old succession, as in the present instance, the case is not within the section, and the result is that the only duty payable is that upon the new succession. Here there has not been merely an alienation of the old succession, but an exercise of a power of disposition overriding the old succession. In the case of *In re Cooper and Allen* to *Harlech* (1) Jessel M.R. held that the true interpretation of the words "have become vested by alienation or by any title not conferring a new succession" in s. 15 was that the words "not conferring a new succession" must be read with the word "alienation" as well as with the words "any title." It is true that in *Lord Wolverton* v. *Attorney-General* (2) Lord Herschell expressed dissent from that ruling of Jessel M.R., but it was not necessary in that case to decide the point; and therefore, it is submitted, *In re Cooper and Allen* to *Harlech* (1) is not overruled, and remains an authority on the point. But, independently of the construction so put on the words of the section by Jessel M.R., the result is the same. The Crown seeks to regard s. 15 as one passed for the benefit of the taxpayer, treating the case as if, but for that section, upon a tenant for life and remainderman joining to alien an estate, the succession would come into possession at once, and the

(1) 4 Ch. D. 802. (2) [1898] A. C. 535.

duty be immediately payable. It is submitted that it is impossible to maintain that, while the tenant for life is still alive, the duty would become payable as upon a succession on his death, if the tenant for life and the remainderman join in selling the estate. There is an inchoate liability, no doubt, under the disposition creating the succession, but the duty can only become exigible upon the succession taking effect in possession upon the death of the tenant for life. If that could never happen by reason of the property having become vested in possession in an alienee before the death of the tenant for life, then the duty never would become exigible, unless some provision, such as is contained in s. 15, for carrying on the liability were made. Therefore, in such a case, the Crown would lose the duty but for the provision for carrying on the liability on alienation contained in s. 15. That section is, therefore, an enactment extending the liability of the taxpayer, and, as such, cannot be construed so as to extend it further than the words of the section distinctly import; and it is subject to an exception, namely, where the property has become vested before the death of the tenant for life by a title conferring a new succession. Miss Murray did not acquire possession of the property either by alienation or by a title not conferring a new succession. She acquired possession by a devise from her mother, which created a new succession. Apart from the effect of the disentailing deed in this case, as to which a further point arises, it may be admitted that, if Lord James Murray, the purchaser, had survived the sixth Duke of Northumberland, he would have been liable to the succession duty; but it is otherwise where the purchaser dies first, and a new succession from him comes into possession during the lifetime of the tenant for life. In such case the original claim for duty is displaced by the new succession created by the purchaser's death, for the liability to the original claim is not carried on by s. 15. Hanson on Death Duties, 4th ed. p. 635. The case of *Attorney-General* v. *Lord Cecil* (1) supports the defendants' contention, and that case seems to have been approved of in *Lord Wolverton* v. *Attorney-General* (2) and

(1) (1870) L. R. 5 Ex. 263. (2) [1898] A. C. 535.

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Charlton v. *Attorney-General.* (1) Sect. 12, which provides for a case where the tenant in tail in remainder bars the entail and resettles on himself, shews that the defendants' construction of the Act is correct, for it shews that, in the absence of such a provision, the old succession would be gone: see *Lord Braybrooke* v. *Attorney-General.* (2)

If any succession duty is payable at all, it is as on a succession by the seventh Duke, and should be assessed on the value of the succession considered as an annuity for his life under s. 21 of the Act. Sect. 10 provides that the duty shall be charged at different rates according to the degree of relationship between the predecessor and successor. The terms of that section are strong to shew that the alienee does not become a "successor" within the meaning of the Act. So also are the terms of s. 20. It is submitted that, if liable, the alienee only stands in the shoes of the original successor for this purpose. By s. 15 the person in whom the property becomes vested is to be chargeable with duty at the same time and rate as the person originally entitled in succession would have been chargeable with, if no such alienation had been made or derivative title created. That being so, the annuity ought not to be calculated as on the life of the alienee, but on that of the original successor. *Solicitor-General* v. *Law Reversionary Interest Society* (3) so far as it decides that the alienee is the successor is wrong, and must be taken to be overruled by *Lord Wolverton* v. *Attorney-General.* (4)

It is contended further that the effect of the disentailing deed of 1868 was to destroy the succession from the sixth Duke created by the settlement of 1817. The effect of the Fines and Recoveries Act, 1833, was merely to substitute a deed enrolled for the fiction of a common recovery, but not to alter the effect from that produced by the recovery. The idea of a common recovery was that the estate was recovered by the demandant by title paramount from the tenant in tail, the latter obtaining judgment for lands of equal value against the common vouchee, which lands would in theory be subject to the entail. The

(1) (1879) 4 App. Cas. 427.
(2) (1860) 9 H. L. C. 150.
(3) L. R. 8 Ex. 233.
(4) [1898] A. C. 535.

effect of a recovery would have been that the old disposition was altogether destroyed. It is clear that, when a power of appointment is exercised, the deed creating the power must be read as if it contained the limitations created by the appointment. The effect, under the Fines and Recoveries Act, 1833, of the disentailing deed, and deeds executed thereunder, was to destroy the old estate tail and create a new statutory estate; but it is that estate tail, so destroyed, in respect of the succession to which, although it never fell into possession, the Crown is claiming succession duty. *Lord Lilford* v. *Attorney-General* (1) is not really against the contention for the defendants on this point. There the tenant in tail, who executed the disentailing deed, appears to have succeeded to the estate, and so become liable to the duty, before he executed the disentailing deed, but to have died before the time for payment of any instalment of the duty had arrived; and the question was whether his son and devisee was liable to satisfy the duty which his father ought to have paid. It is obvious that the case raised a wholly different question from that which is raised here. [They cited on this point *Lord Wolverton* v. *Attorney-General* (2); *Attorney-General* v. *Lord Cecil* (3); *Lord Braybrooke* v. *Attorney-General* (4); *Attorney-General* v. *Floyer* (5); *Attorney-General* v. *Smythe*. (6) They also referred to Hanson on Death Duties, 4th ed. pp. 632 and 706.]

Sir R. B. Finlay, *A.-G.*, and *Sir E. H. Carson*, *S.-G.* (*Vaughan Hawkins* with them), for the Crown. The effect of the Fines and Recoveries Act, 1833, was not to give power to create a new title paramount, but merely to make it an incident of an estate tail that it may be converted into a fee simple by the machinery given by the Act. The common recovery was mere formal machinery, and, in substance, the tenant in tail, after disentailing, is in of the same interest as before. The case of *Lord Lilford* v. *Attorney-General* (1) shews that for this purpose the substance of the matter is to be looked at, and that the old disposition is not to be regarded as

(1) (1867) L. R. 2 H. L. 63.
(2) [1898] A. C. 535.
(3) L. R. 5 Ex. 263.
(4) 9 H. L. C. 150, at p. 165.
(5) (1862) 9 H. L. C. 477.
(6) (1862) 9 H. L. C. 497.

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wiped out by the disentailing deed, and what is done under the powers given by it: see also per Martin B. in *Attorney-General* v. *Lord Cecil.* (1) The case therefore stands on the same footing as one in which a tenant for life and remainderman in fee have joined in conveying an estate.

It apparently is not disputed that, if the tenant for life, the sixth Duke, had died in the lifetime of the purchaser, Lord James Murray, the duty claimed would have been payable by the latter, and that in that case the succession duty paid by Miss Murray in respect of her succession on the death of her mother would have also been payable. There would in that case have been two successions taking effect in possession. It would not be a reasonable result that the mere fact of the purchaser happening to survive the tenant for life should have the effect contended for by the defendants, namely, of making one duty only payable in that case, whereas two duties would be payable in the other. This case is exactly within the words of the last sentence of s. 15 which provide that, where the title to any succession is accelerated by the surrender or extinction of any prior interests, then the duty thereon shall be payable at the same time and in the same manner as such duty would have been payable if no such acceleration had taken place. The previous words of the section would also have the same effect, and do not help the defendants' contention. The effect of s. 2 is that, as soon as the succession is created, the duty attaches, though by s. 20 it only becomes payable when the property comes into possession under it. But, when that takes place, the duty becomes payable, and, apart from some such provision as is contained in s. 15, the effect of an acceleration of the possession by merger, such as would be effected by the tenant for life and remainderman joining in conveying the property, would be that the duty would become payable immediately. The object of the section is to postpone the payment till the death of the tenant for life. All the judgments in *Lord Wolverton* v. *Attorney-General* (2) appear to assume that, when by a settlement an interest has been created to take effect on the lapsing of a life interest, the duty attaches to the succession

(1) L. R. 5 Ex. 263, at p. 271. (2) [1898] A. C. 535.

thus created, and the liability to it cannot be destroyed by what is done subsequently in the way of alienation or other disposition of the property. By s. 42 the duty is made a first charge on the interest of the successor as soon as it attaches. The words "not conferring a new succession" in s. 15 are not to be read as if they qualified the word "alienation": see per Channell B. in *Attorney-General* v. *Lord Cecil.* (1) The judgment of Jessel M.R. in the case of *In re Cooper and Allen* to *Harlech* (2) must be taken to be overruled by the judgments in *Lord Wolverton* v. *Attorney-General.* (3) An alienation cannot confer a new succession. The words "any title not conferring a new succession" refer to a transmission by operation of law, such as by bankruptcy, where the interest of the successor in the property becomes vested in some other person, but there is no succession within the Act. Sect. 15 is intended to deal with cases in which, either by alienation, or by some other analogous title by which no new succession is conferred, the succession has been divested out of the original successor, and become vested in another. There is no hardship on purchasers involved by the contention for the Crown, for the liability to the payment of duty on the death of the tenant for life is allowed for in fixing the terms of purchase.

With regard to the question on whose life the annuity is to be calculated, the rate of duty is, no doubt, determined by the degree of relationship between the predecessor and the successor under s. 10, but that has nothing to do with the question of the value of the interest taken by the successor. It is the person actually coming into possession of the property, whose life is the measure as regards that question, and who is to be treated as the successor for the purposes of s. 21 of the Act. *Solicitor-General* v. *Law Reversionary Interest Society* (4) is a clear authority to the effect that the alienee of a succcession becomes a "successor" within the meaning of the 21st section; and that case has never been overruled.

Cur. adv. vult.

(1) L. R. 5 Ex. 263, at p. 269.
(2) 4 Ch. D. 802.
(3) [1898] A. C. 535.
(4) L. R. 8 Ex. 233.

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March 23. COLLINS M.R. read the following judgment:—In this case the Crown claims succession duty on the death of the sixth Duke of Northumberland in respect of a piece of land, a portion of the Northumberland estates settled in 1817. Ridley J. has decided in favour of the Crown. The defendants appeal. The material facts are thus stated by Ridley J. "By a settlement dated April 19, 1817, large estates in Northumberland were limited to certain uses, and in 1867 (in the events which had happened) they stood limited to the use of the sixth Duke of Northumberland for life, with remainder to his eldest son in tail male. In 1868 disentailing deeds were executed giving a joint power of appointment to the sixth Duke and his eldest son, Earl Percy, now seventh Duke; and on December 1, 1870, under that power of appointment a parcel of land, which was part of the estates so brought into settlement, was conveyed to Lord James Murray in fee. In 1874 Lord James Murray died, having devised his estates to his wife, and in 1888 the widow died, having devised them to her daughter, Miss Murray, one of the defendants. She paid succession duty under 16 & 17 Vict. c. 51, s. 10, and 51 & 52 Vict. c. 8, s. 21, at the rate of 1½ per cent. on the value of the interest derived from her mother (considered as an annuity) in the real estate so devised to her, including this particular parcel of land. On January 2, 1899, the sixth Duke of Northumberland died, and it was now contended that succession duty became payable on his death in respect of this piece of land, under the same statutes, at the rate of 6½ per cent. But it was not contended by the Attorney-General, having regard to the date of the sale to Lord James Murray, that s. 18 of the Finance Act, 1894, applied, and, therefore, it was asked that the percentage should be calculated on the value of the interest considered as an annuity under s. 21 of the Succession Duty Act, 1853."

The contention of the Crown, which Ridley J. has accepted, is that the second half of s. 15 applies to the case, and that duty is payable under that section by Miss Murray in respect of the succession of the seventh Duke, which passed to her father by alienation under the indenture of December 1, 1870,

and of which she was in possession at the date of the death of the sixth Duke, and that the fact that she has paid succession duty in respect of her own succession upon a devise from her mother, who survived Lord James Murray and took the succession under a devise from him, is no answer to the Crown's claim. The appellants rely on *In re Cooper and Allen* to *Harlech* (1), decided by Sir George Jessel, which, if well decided, governs the present case. They also contend that the disentailing deed of 1868 and the settlement which followed upon it had the effect of destroying the succession of the seventh Duke created under the settlement of 1817. Subject to this point the question on this appeal is whether *In re Cooper and Allen* to *Harlech* (1) was well decided. Before going further it is necessary to refer to certain sections of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51). Sect. 1 provides that "the term 'succession' shall denote any property chargeable with duty under this Act." [The Master of the Rolls here read s. 2 and s. 15 from the words "and where, after the time appointed for the commencement of this Act," to the end.] Sect. 20 provides that "the duty imposed by this Act shall be paid at the time when the successor, or any person in his right, or on his behalf, shall become entitled in possession to his succession, or to the receipt of the income and profits thereof." Sect. 42 provides that "the duty imposed by this Act shall be a first charge on the interest of the successor, and of all persons claiming in his right, in all the real property in respect whereof such duty shall be assessed."

Subject to the point as to the effect of the disentailing deed, both sides are agreed that the deed of December 1, 1870, was an alienation of the seventh Duke's succession to Lord James Murray within s. 15, and that had he survived the sixth Duke, not having himself transferred it, he would have been liable to pay the duty on the death of the sixth Duke. Had he devised it to his daughter and died, she would have had to pay duty in respect of her succession to her father. Does the fact that her father predeceased the sixth Duke make any difference? I think the reasoning of Lord Herschell in

(1) 4 Ch. D. 802.

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Lord Wolverton v. *Attorney-General* (1) is conclusive that it does not. By s. 42 of the Act of 1853 the duty is a first charge on the interest of the successor. Therefore the succession came to Miss Murray subject to this charge. How has she got rid of it? "If the person has had a succession conferred upon him, he cannot by parting with it prevent it from being a succession; that is, prevent it from being property liable to the duty. It continues a succession, and will be, when the proper time comes, a succession enjoyed in possession, into whatever hands it has come": per Cleasby B., delivering the judgment of the Court in *Solicitor-General* v. *Law Reversionary Interest Society*. (2) "I am unable to find in the Act," says Lord Herschell in *Lord Wolverton* v. *Attorney-General* (3), "any warrant for the view that a succession once created can, by the act of the successor, cease to exist and another succession be substituted for it." But it is only by substituting the new succession of Miss Murray for the original succession of the seventh Duke that the appellants can succeed. It is not necessary to examine once again the numerous cases decided upon s. 15 before *Lord Wolverton* v. *Attorney-General* (1), nor to repeat at length here the reasons given by Lord Herschell for his opinion, but they are to my mind conclusive that *In re Cooper and Allen* to *Harlech* (4) was wrongly decided. Therefore on this, which was the point principally discussed in argument, I am of opinion that the decision of Ridley J. is right.

Next with regard to the effect of the disentailing deed. Here too I agree with Ridley J. I think the point is concluded by authority. *Lord Braybrooke* v. *Attorney-General* (5), and the other cases cited in the same volume, and *Lord Lilford* v. *Attorney-General* (6), seem to me to establish that the effect of such a deed and the resettlement which followed was not such as to absolve the seventh Duke from the obligation of paying succession duty. "I consider it my duty," says Lord Campbell, "to remind your Lordships of the extreme inconvenience which may arise from departing from the broad rule laid down

(1) [1898] A. C. 535.
(2) L. R. 8 Ex. 233, at p. 238.
(3) [1898] A. C. 535, at p. 548.
(4) 4 Ch. D. 802.
(5) 9 H. L. C. 150.
(6) L. R. 2 H. L. 63.

by the Court of Exchequer, that a tenant in tail in remainder cannot vary the succession duty to which he will be liable by barring the entail and resettling the estate": *Lord Braybrooke* v. *Attorney-General*. (1) In that case on disentailment by tenant in tail in remainder after a life estate in his father and a resettlement by father and son to such uses as they should appoint, an appointment was made by them to the father for life, remainder to the son for life, remainder to his first and other sons in tail, and on the father's death it was held that the son took a succession under a disposition made by himself under s. 12 of the Act. The disentailing deed did not annul the father's life estate. Therefore what the son had to dispose of was a succession liable to duty. The succession was not destroyed by the enlargement of the estate tail into a fee. Lord Campbell and probably Lord Kingsdown would have reached the same conclusion under s. 15. In other words, the transaction involved an alienation of a succession. So here, if there had been no sale under the power to Lord James Murray, the seventh Duke would have taken a succession under a disposition made by himself. The point, therefore, that the succession was wiped out by the disentailment is no longer open. I have dealt with the case without reference to the clause as to acceleration by the surrender or extinction of prior interests in s. 15, which certainly does not assist the appellants.

With regard to the point that the duty should be calculated by reference to the life of the original successor, the seventh Duke, and not that of the ultimate alienee, Miss Murray, we cannot decide in favour of the appellants without overruling *Solicitor-General* v. *Law Reversionary Interest Society* (2), decided more than thirty years ago and continually acted upon since. This I am not prepared to do, even if I disagreed with it, which I do not. The appeal must be dismissed.

ROMER L.J. read the following judgment:—I agree with the judgment of the Master of the Rolls in this case, and only desire to add some observations on certain points.

(1) 9 H. L. C. 150, at p. 170. (2) L. R. 8 Ex. 233.

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In the present case a tenant for life and remainderman conveyed land to such purposes as they should appoint, and then appointed the land to a person in fee. For the purposes we have to consider on this appeal, I think it is clear on the authorities that the case should be dealt with as if they had conveyed the land direct to that person in fee. That being so, the question arising in the present appeal may be stated as follows: A., tenant for life, and B., tenant in tail, alienate land to C. in fee by disentailing deed duly enrolled. C. then enters into possession, and dies in the lifetime of A., having devised the land to D., who thereupon enters into possession, and pays succession duty as succeeding C. Then A. dies, and the question is whether succession duty is then payable by D. as on A.'s death; and, if that question be answered in the affirmative, there is a subsidiary question as to how the duty is to be estimated.

The appellants say that no succession duty is payable. They contend, in the first place, that, even if B. had been tenant in fee, no duty would have been payable; and, as a second point, they contend that, even if duty would have been payable, had B. been tenant in fee, it is not payable, because B. was only tenant in tail.

With regard to the first point, the appellants rely on the fact that D. had to pay duty on C.'s death as his successor; and they urge that, having so succeeded to the land and paid duty, there was in fact no fresh succession by D. on A.'s death, and that D. could not be liable for more than one succession duty; and the appellants rely on the decision of Sir G. Jessel M.R. in the case of *In re Cooper and Allen to Harlech.* (1) But that decision, and the grounds on which it was based, have since been considered, and, as it appears to me, disapproved of by the House of Lords in the case of *Lord Wolverton* v. *Attorney-General* (2), and in particular were shewn to be unsound by the reasoning of Lord Herschell in his speech in that case. That reasoning appears to me convincing; but, inasmuch as the appellants challenge it, I desire to add a few remarks, even at the risk of repeating part of

(1) 4 Ch. D. 802.

(2) [1898] A. C. 535.

what Lord Herschell in the last-mentioned case, and the Master of the Rolls in the present case, have said.

In the first place, if I consider the position of C. immediately before he died, it appears to me clear that in strict accordance with the express provision of the second part of s. 15 of the Act (16 & 17 Vict. c. 51), the succession of B. had become vested in C. by alienation, and that the duty in respect of that succession thereupon became payable at the same time and rate as the same would have been payable, if no alienation had been made; and it is further clear from the section that the alienation of A.'s life estate to C., and the merger consequent thereon, did not operate to prevent the duty being payable. See also s. 20 of the Act, which provides that the duty imposed by the Act shall be paid at the time when the successor "or any person in his right" shall become entitled in possession to his succession. The words "in his right" would include purchasers and other derivative owners whose liability to the payment of duty is regulated by s. 15. It also follows from the provisions of s. 42 of the Act that, inasmuch as C. claimed "in right" of B., the duty became a first charge on the land. That being so, how has that charge been got rid of? As Lord Herschell pointed out, there is nothing whatever in the Act from which it can be inferred that, by any disposition on C.'s part of the land, he could free the land from the charge. He may, of course, dispose of the land so as to create further successions, in respect of which further duty may become payable, but that will not in any way interfere with the duty already charged on the land, subject only to the provision made by s. 12 of the Act in favour of C., if he himself became a successor by virtue of his own disposition. The arguments by which the appellants seek to escape from this result in the present case are founded on a misconception of the true position of D. He has not been required to pay duty twice for one succession. There are two distinct successions and two distinct duties. One duty became payable by reason of C.'s death in A.'s lifetime, when D. succeeded C. by virtue of C.'s disposition, and in that case duty became payable by D., taking from C. as his predecessor. How the amount of

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that duty should have been estimated, and whether or not by reference to the suggestion that D. only then succeeded as it were during the rest of A.'s lifetime, we are not now concerned with, though I am by no means suggesting that the Crown was wrong in estimating that duty in the way it did. The next succession occurred by reason, not of C.'s death, but of A.'s, and then the duty already charged on the land in C.'s hands became payable under s. 15 of the Act, and that duty is assessed without in any way being concerned with C. as a predecessor. In the same way two distinct successions would have occurred, and two distinct duties would have been payable if C. had died after A. On A.'s death in that case C. would have paid duty as successor; and then, if C. had died, D. would have had to pay duty as successor of C. The true position of affairs is somewhat obscured by reason of the merger of A.'s estate and B.'s estate, because they were both aliened to C. The true way to regard the case (especially having regard to the provisions as to merger in s. 15) is to consider how matters would have stood if there had been no merger. C. obtained possession of the land, not because he had acquired B.'s estate, but because he had acquired A.'s estate. On C.'s death in A.'s lifetime, D., claiming through C. as owner of A.'s life estate, took possession, and had to pay duty. B.'s estate in remainder expectant on A.'s death had nothing to do with that possession or duty. But, inasmuch as the remainder had been aliened to C., and D. had become owner of that remainder by reason of C.'s devise to him, when he succeeded on A.'s death, he had to pay duty; for it is clear that, if the owner of a remainder charged with duty devises it, the devisee only acquires that remainder subject to the duty. The general question may be further illustrated by considering how matters would have stood if A.'s estate and B.'s estate had been acquired by D. at different times. For example, if C. had only acquired A.'s estate, and then had died in A.'s lifetime, having devised that estate to D., succession duty would have been payable by D. In that case B.'s estate in remainder would have clearly remained liable to its duty on A.'s death, and, if B. had, after C.'s death and before A.'s death, aliened the

remainder to D., duty would have been payable by D. as alienee on A.'s death. But it is unnecessary to multiply cases bearing on the point now before me. All I need say is that I am satisfied with regard to the first point taken on behalf of the appellants that, if B.'s estate had been a remainder in fee, duty would have been payable on A.'s death.

ROMER L.J.

The next point then arises, whether the duty ceased to be payable, because B.'s estate was one in tail, and was barred by the disentailing deed. The appellants contend that the effect of that deed was to destroy B.'s estate in tail, and to create an entirely new estate in C., which was not liable to the duty to which the estate tail was liable. This contention appears to me unsound, and is really disposed of by authority. Since the Fines and Recoveries Act, especially having regard to s. 15 of that Act, which expressly provides that a tenant in tail shall have full power to dispose of the entailed land for an estate in fee simple absolute, it appears to me that it cannot properly be said that a tenant in tail alienating by disentailing deed under the Act thereby destroys for the purposes of succession duty the interest he possessed in the estate. What he did, by disentailing by exercise of the powers vested in him, was to render that estate perpetual, and the effect of such a deed may be quite different from that caused by a fine being levied or a common recovery suffered prior to the Act. It was on this ground that the case of *Lord Lilford* v. *Attorney-General* (1) was decided in the House of Lords. In that case Lord Chelmsford said, after referring to s. 15 of the Fines and Recoveries Act: "The disentailing deed did not operate to destroy the interest of which he was the successor, but enabled him, by the exercise of the power which that interest gave him, to render it perpetual"; and Lord Cranworth dealt with the point as follows: "The power of barring the entail, and so becoming competent to dispose of the property by will, was incident to the estate tail which Lord Lilford took, ... and therefore, when he executed the disentailing deed . . . . he may be treated as having, in the language of the 21st clause, been competent to dispose by will of a continuing interest in

(1) L. R. 2 H. L. 63.

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the property. He may be treated, for the purpose of succession duty, as if he had been a devisee of the fee simple." Lord Colonsay also addressed the House to the same effect: see also the observations of Lord Campbell L.C. and of Lord Kingsdown in *Lord Braybrooke* v. *Attorney-General*. (1) The effect of the statement by Lord Campbell in that case (2) that "the tenant in tail in remainder, when he bars the entail, may, if he pleases, alienate the estate, and no succession duty will be payable by him" has, I think, been misunderstood by the appellants' counsel. I think that all Lord Campbell meant was that, as between the tenant in tail and the alienee, the latter would have to pay the duty. A tenant in tail may of course by disentailing deed, in the same way as he could have done, if he had been a tenant in fee, resettle land so as to cause a new succession to arise under that settlement, and so that the persons claiming under that settlement could not be said to be alienees under an alienation within the meaning of the word "alienation" as used in s. 15 of the Succession Duty Act. But it appears to me clear that, if a tenant in tail by disentailing deed simply assures the fee absolutely to a person, that person takes under an alienation within the meaning of the section.

The only case, which at first appeared to me to occasion difficulty, was the *Attorney-General* v. *Lord Cecil* (3), a case much relied on by the counsel for the appellants. But, having examined that case carefully, I come to the conclusion that it does not really assist the appellants in the present case, nor occasion any difficulty, at any rate on the ground on which it appears to me to have been decided. I think that case was decided on the ground that there was a resettlement by Lord Cranbourne, the tenant in tail, under which Lord Eustace Cecil took an interest, and such an interest that he could not be said to be entitled to it as an alienee under an alienation by Lord Cranbourne within the meaning of s. 15 of the Succession Duty Act. This appears to me clear, when the judgments of the Barons who decided it are considered. Kelly C.B. (4) said:

(1) 9 H. L. C. 150, at pp. 165, 166, 181.
(2) 9 H. L. C. 150, at p. 170.
(3) L. R. 5 Ex. 263.
(4) L. R. 5 Ex. 263, at p. 271.

"a new succession was conferred on Lord Eustace Cecil. The case is exactly the same as if, on the purchase of a property, ... the purchaser had created a term out of the estate so acquired by him. Being thus excluded from the operation of the 15th section, the case is left to the operation of the 2nd section; it is a succession to which Lord Cranbourne is the predecessor, and the Crown is entitled to duty on that footing"; and Martin B. (1) observed, referring to s. 15: "But it appears to me that the clause relied on has no application to the present case; it refers not to the creation of an interest by way of settlement, but to an alienation in the ordinary sense, as if, for instance, the late Lord Cranbourne had sold the whole of his interest to some third person before it came into possession"; and, to make his view even more clear, he added: "Whether, inasmuch as Lord Cranbourne, if he had survived without making this appointment, must have paid duty on the whole property, a double duty is not payable, first on the whole interest out of which this term is carved, and then upon the charge itself, is a matter on which I give no opinion." Channell B. (2) said: "I think . . . . the Attorney-General is right in saying that a new succession has been created, which prevents the case from falling within the second branch of the 15th section"; and lastly Cleasby B. ended his judgment as follows: "I think the Crown is entitled to judgment: first, I am not satisfied that this is a case where the succession of Lord Cranbourne has become vested in any other person; and, secondly, if it has, it is by a title which creates a new succession." I think this view of the case was also that taken by the House of Lords in *Lord Wolverton* v. *Attorney-General*. (3) It appears to me, therefore, that the Crown is right in contending that duty was payable in the present case.

The only remaining point is as to the amount of duty: whether the amount is calculated upon the enjoyment of the property which the person actually taking is expected to have. I think it is. The precise point was decided in *Solicitor-General* v. *Law Reversionary Interest Society* (4), and that case was in

(1) L. R. 5 Ex. 263, at p. 272.
(2) L. R. 5 Ex. 263, at p. 273.
(3) [1898] A. C. 535.
(4) L. R. 8 Ex. 233.

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my opinion rightly decided for the cogent reasons given by Cleasby B. in delivering the judgment of the Court, and those reasons I need not repeat. It follows that in my judgment the appeal must be dismissed.

MATHEW L.J. read the following judgment:—I agree in the comments made by the Master of the Rolls and Romer L.J. upon the authorities cited in the course of the argument. I propose to state briefly the grounds upon which I am satisfied that this appeal should be dismissed.

Under the deed of 1817, and the Act of 1853, succession duty became payable upon the death of the sixth Duke of Northumberland in respect of the estates, the subject of the deed. Under s. 42 the duty was a first charge upon the property in respect of which it was assessed. Under the disentailing deed of 1868 the duty remained payable, and would have been due to the Crown upon the succession of the seventh Duke of Northumberland, if no change had been made meanwhile in the disposition of the property. After the deed of 1868, the sixth and seventh Dukes of Northumberland, as respectively tenant for life and tenant in fee of the estates in effect conveyed the lands in respect of which the duty has been assessed to Lord James Murray in fee. Under s. 15 the duty then charged upon the lands became payable at the same time and at the same rate as if no such alienation had taken place, namely, upon the death of the sixth Duke. Lord James Murray died in the lifetime of the sixth Duke, and before the duty had become payable; and his estate passed to his daughter, who paid succession duty on the value of her interest. Upon the death of the sixth Duke the succession duty charged upon the estate was claimed by the Crown, but payment was refused, and these proceedings were taken to make the defendants accountable.

The grounds upon which it was contended that the defendants were not liable were submitted in an elaborate and lengthy argument, in which the learned counsel for the defendants struggled in vain to escape from the clear language of s. 15.

It was, as I understood, admitted that, if Lord James

Murray had survived the sixth Duke, the duty would have been payable. But it was said that his death in the lifetime of the tenant for life made all the difference. The result, it was contended, was that only one succession duty, namely, that paid by the daughter, was claimable. But the answer seemed clear that two duties were due, because there had been two successions: (1.) the duty payable upon the succession of the seventh Duke, and (2.) that payable upon the succession of the daughter.

It was further contended for the appellants that the estates comprised in the disentailing deed were by that instrument relieved of the succession duty previously charged upon them. The deed, it was said, created a new estate, and swept the charge away. No authority was referred to in support of this argument. The previous decisions pointed to a different conclusion. The old fine and recovery were alleged to have created a new estate, and the disentailing deed, it was said, must be taken to have had a similar operation. But the former method of disentailing was only a clumsy mode of expanding the estate tail into an estate in fee. It had in reality no greater effect than the later method of accomplishing the same result. It might as well be argued that the deed would have relieved the estates of any mortgages upon them. It seems to me that nothing has occurred to discharge the duty now claimed, and therefore the Crown is entitled to our judgment.

I agree that the amount of the duty must be calculated in the manner pointed out by the Master of the Rolls.

Appeal dismissed.

Solicitor for the Crown: *Solicitor for Inland Revenue.*
Solicitors for defendants: *Bell, Steward, May & How.*

E. L.

C. A.
1904
March 4.

[IN THE COURT OF APPEAL.]

BOULTON AND OTHERS *v.* HOULDER BROTHERS & CO. AND OTHERS.

Practice—Discovery—Marine Insurance—Ship's Papers—Action by Underwriters — Recovery of Money overpaid—Right of Plaintiffs to full Discovery.

The plaintiffs, who were underwriters of a policy of marine insurance entered into by them with the defendants, paid a sum of money in respect of a claim arising out of the policy. They subsequently brought this action to recover back a part of the money upon the ground that, owing to a fraudulent misrepresentation of the defendants as to the amount expended upon the repairs of the ship insured, the plaintiffs had paid to the defendants a sum in excess of the amount actually expended upon the repairs. On an application by the plaintiffs for discovery:—

Held, that the plaintiffs were entitled to full discovery by the defendants, including the obligation to produce, or to give on oath reasons explaining their inability to produce, documents which were not in their custody, or which were in their custody as agents for other persons, and to give such information as to documents not produced as they could obtain by reasonable exertions on their part.

APPEAL from an order of a judge at chambers.

The action was brought by a number of underwriters against the defendants to recover in effect certain overcharges made in claims on policies of insurance, and also damages for conspiracy to defraud the plaintiffs. It appeared that the plaintiffs had underwritten a number of policies on steamships, the policies having been effected by Houlder Brothers & Co., the first-named defendants, in their own names. Houlder Brothers & Co. were largely interested in and were the managers of the various steamships that had been insured, and they had made claims and had received payments under the policies. It was alleged in the statement of claim that some of the claims so made were fraudulent; that the defendants other than Houlder Brothers & Co. had made out false and excessive accounts for repairs to ships, and that Houlder Brothers & Co. had supported the claims made under the policies by means of those accounts with the purpose of defrauding the underwriters. The plaintiffs alleged that by this means they had been called

upon to pay and had paid sums largely in excess of the sums actually paid for repairs. They claimed to be repaid these overcharges, and they also claimed damages from all the defendants for conspiracy to defraud. It appeared that a number of single ship companies, who owned some of the vessels that were insured by the plaintiffs and in respect of which claims had been made, went into liquidation for the purpose of being amalgamated into a single company, the Houlder Line, Limited, and that this amalgamation had been carried out. The Houlder Line, Limited, were not parties to the action. The defendants Houlder Brothers & Co. pleaded that until October, 1900, they had no knowledge that any claims had been presented to the underwriters in excess of the amounts payable, and while denying liability they paid into court a sum of money which they alleged to be sufficient to meet the claim of the plaintiffs. The plaintiffs obtained an order for particulars as to the payment into court, and from the particulars delivered it did not fully appear in respect of which underwriters or policies the payment had been made. An application for discovery of the policies being made, an affidavit was filed on behalf of the defendants giving in schedules a list of the ships insured and the amounts for which they were insured. The first schedule gave a list of policies which were in the hands of Houlder Brothers & Co., as to the production of which no objection was raised. The second schedule related to policies that had been in their possession but had been lost. The third schedule related to policies that had been in their possession as managers of the single ship companies, but were, on their liquidation, deposited in court, and were alleged to be either in court or in the exclusive possession of the liquidator, D. F. Basden. The fourth schedule related to policies in the physical possession of the members of the firm of Houlder Brothers & Co. as directors of the Houlder Line, Limited, whose property they were. These policies were alleged to be in the exclusive power and control of the Houlder Line, Limited, and it was averred that Houlder Brothers & Co. could not produce the same or any of them.

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Upon an application by the plaintiffs for further discovery, an order was made by a master that Houlder Brothers & Co. should produce the several policies for inspection by the plaintiffs subject to any order of Buckley J. as to any documents in the custody of the Court or of the liquidator, Mr. Basden. Upon appeal Bucknill J. ordered that the order of the master should be varied by limiting the discovery to the policies in the possession or control of the defendants as such, excluding those which were in the possession of Mr. Basden (the liquidator) and of the Houlder Line, Limited.

The plaintiffs appealed against this order.

Rufus Isaacs, K.C., and *Sims Williams* (*T. Mathew* with them), for the plaintiffs. The principle that underwriters are entitled to the extended discovery under the usual order made where they are defendants has been maintained in a long series of cases. In *Janson* v. *Solarte* (1) it was pointed out that it was ancient practice, and that it would be difficult and perhaps dangerous to limit the power of underwriters in respect of discovery. In *Rayner* v. *Ritson* (2) Cockburn C.J. pointed out that the obligation to make full discovery arose from the particular nature of the contract of insurance, and his judgment is cited with approval in *China Traders' Insurance Co.* v. *Royal Exchange Assurance Co.* (3), and in *China Steamship Co.* v. *Commercial Assurance Co.* (4) The reason given is that the underwriters are in the dark as to the transactions, whereas the shipowner knows everything. The present case is not an action on a policy of marine insurance, but such a policy is the foundation of the claim. The underwriters are equally in the dark whether they are being sued or are suing, and the principle of the observance of the greatest faith by the assured, not merely in the inception of the contract but in carrying it out, which is shewn by the decision last cited, is equally applicable to either case. It follows, if this is so, that the plaintiffs are entitled to full discovery, not merely of the documents in the defendants' possession, but of

(1) (1836) 2 Y. & C. 127; 47 R. R. 374.
(2) (1865) 6 B. & S. 888.
(3) (1898) 3 Com. Cas. 189.
(4) (1881) 8 Q. B. D. 142.

all documents that they can obtain by reasonable exertions on their part. As to these documents, they must satisfy the Court that they have done all that they can to produce them: *West of England Bank* v. *Canton Insurance Co.* (1); *London and Provincial Insurance Co.* v. *Chambers.* (2) It is only by inspection of the policies that the plaintiffs can inform themselves as to whether the sum paid into court covers all the excess charges which they are entitled to recover. They would ascertain this from the indorsements on the policies, which set out the names of the underwriters and the amounts paid by each of them. It is worth noting that the order for ship's papers in actions of marine insurance is in the form of a direction, not merely to the assured, but to all persons interested. It is submitted that the order of the master was right and should be restored.

J. A. Hamilton, K.C., and *Bremner* (*G. Hay Morgan* with them), for the defendants. The contention set up on behalf of the plaintiffs, that the nature of the contract of insurance is such that it imports a special obligation of good faith which the Court will enforce by an order for discovery, is not applicable in this case. This is not an action on a marine policy, though the transaction arose upon one, but it is an action for fraud and conspiracy. It has never been suggested in any case that an underwriter suing on the ground of a mistake in fact, on which he has paid money that was not due, is entitled to disclosure of ship's papers. In *Henderson* v. *Underwriting and Agency Association* (3) Cave J. pointed out the practice which prevails in marine insurance actions was not applicable to the case, although the risk was in some respects a marine risk. The particular principle on which the practice is founded is not applicable to cases of life insurance: *Thomson* v. *Weems* (4), as pointed out by Lord Blackburn. The order for disclosure of ship's documents in actions on a marine policy is a matter of practice, and as such ought not to be extended beyond the actions to which it is applicable.

(1) (1877) 2 Ex. D. 472.
(2) (1900) 5 Com. Cas. 241.
(3) [1891] 1 Q. B. 557.
(4) (1884) 9 App. Cas. 671, at p. 684.

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The fact that the obligation of disclosure ends when the contract is entered into—*Cory* v. *Patton* (1)—is inconsistent with the idea of a general principle which would run through the whole proceedings. The origin of the practice can be traced to the desire to save expense by a consolidation order: *Twizell* v. *Allen*. (2) It can be enforced in the case of a plaintiff by stay of the action unless he complies with the order of the Court; but if such an order is made on a defendant and he cannot comply with it, the practical effect is to strike out his defence. The defendants are willing to produce all the documents in their possession in their own right, but they have no power over the documents in the hands of the Houlder Line, Limited, or of the liquidator, and ought not to be called upon to produce even those physically in their possession, but only as custodians for other persons: *Williams* v. *Ingram*. (3)

Sims Williams, in reply.

COLLINS M.R. This is an appeal from an order by Bucknill J. for discovery by the plaintiffs. The plaintiffs are underwriters, and they are seeking to recover from the principal defendants sums which are alleged to have been overpaid to them. It is the fact and it is common ground that those defendants did demand and receive from the plaintiffs sums in respect of damage to ships insured by them in excess of the sums really due.

The case is complicated in this way: The persons who claimed and received the sums under policies effected with the underwriters were themselves agents for certain companies, and were also partly acting for themselves. If in any proceedings on those policies the underwriters had resisted the claims, or had thought it desirable to investigate them, it is not disputed that the underwriters would have been entitled to the fullest discovery, such as is asked for in this case. That discovery, in accordance with a long series of cases, would have imposed upon the persons suing the underwriters the obliga-

(1) (1872) L. R. 7 Q. B. 304, at p. 308.

(2) (1839) 5 M. & W. 337.

(3) (1900) 16 Times L. R. 451.

tion to produce, or to give on oath reasons explaining their inability to produce, documents which were not in their own custody, or which were in their custody as agents for other persons. They would have had to account fully for their inability to produce those documents, and to satisfy the Court that they had taken the utmost possible means in their power to enable them to give to the underwriters all information with respect to them. The underwriters, in the cases which gave rise to this action, did not demand explanations, but paid the claims in full, and it now turns out that the claims were to a considerable extent in excess of the sums which were due.

In that state of things the underwriters, who paid sums in respect of losses that did not occur, have brought an action to recover the amount overpaid, and the action has also taken the form of an action for a fraudulent conspiracy on the part of all the defendants to defraud the underwriters. Being the plaintiffs in that action, they demand the same facilities for discovery as they would have had as defendants sued upon the policies had they disputed the claims and been subject to an action by the assured. They claim that they should not be placed in a worse position as to discovery, because by—to use a neutral term—the misstatements of the assured they were ready to forego their right to demand discovery as to the claim made against them, and are obliged now to take up the position of plaintiffs to get back the money paid on the misrepresentations of the assured. It is asked by counsel for the defendants whether the Court is going to give to the plaintiffs in an action for conspiracy a right to discovery which is given only in actions on policies of marine insurance. I say Yes, because the substance of the matter is a claim arising out of a policy of marine insurance. It is entirely owing to the misrepresentation complained of that the change in the position of the parties has been brought about, so that the underwriters instead of being defendants have become plaintiffs. It seems to me that where that change has taken place, and is to be imputed solely to the misstatement—I do not say fraud—of the assured, the underwriters ought not to be in a worse position than that in which they would have been had they originally sifted the

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claims made against them. In taking up this position I am not extending the principle on which the cases that I have mentioned are founded to cases beyond those to which it has hitherto been applied, but I am treating the present case as within the principle, because it brings into suit rights as between insurer and assured. It does not seem to me to matter which of the parties is plaintiff and which defendant, for the relation between underwriter and assured in either case is such that the discovery now asked for is the due of the underwriter.

It may be perfectly true, as suggested, that the occasion which gave to the Courts the opportunity of enforcing this particular obligation upon persons who were suing underwriters was that it was a term introduced upon an order for consolidation of actions. That may have been the opportunity for putting into practice the principle that, as between underwriter and assured, the former was entitled to the fullest discovery as an incident of the contract of insurance. Whatever the origin, the principle has long been acted upon in the Courts, and I do not think there is a dangerous extension of the principle in applying it to the present case. The reason why discovery is sought in this extended form in this case is that many of the documents, such, for instance, as the policies of insurance, are said to be in the custody of the defendants only as agents for other persons, though they themselves are interested to some extent, and that some of them are in the custody of the liquidator of some of the companies which were amalgamated into the Houlder Line, Limited. The discovery allowed in an ordinary action would be ineffectual in such a case as the present.

The particular form which the order ought to take is a matter of some nicety, and we shall leave it to be drawn up by the parties, and settled if necessary by a member of the Court. It ought certainly to embrace a statement on oath by the defendants as to the steps that they have taken to put themselves in a position to produce the documents, and, failing to produce them, they should be directed to give such information as to them that they can obtain by reasonable exertions on

their part. That relief, I think, the plaintiffs are entitled to, and the appeal must consequently be allowed.

ROMER L.J. I have felt considerable doubt in the course of the argument, and I cannot say that it has been wholly removed; but my brethren are clearly of opinion that the practice with regard to policies of marine insurance referred to in the authorities, as, for example, in the case of *West of England Bank* v. *Canton Insurance Co.* (1), can be and ought to be applied in this case as against the defendants. That being so, I shall not differ from them. I may say that my doubt arises from the fact that in this case the defendants Houlder Brothers & Co. appear to have effected the policies on behalf of certain limited companies who are not parties to the action, and that this action is one to recover damages for a conspiracy to defraud alleged against all the defendants. I am, however, pleased to think that, on the merits of the case, apart from technical objections, there is no good reason, so far as appears, why the policies should not be produced by those who have the actual custody of them, and I think, moreover, that if the defendants do their best there is every reason to hope that they can in fact get the documents produced; and certainly the production of them is most important to the plaintiffs.

MATHEW L.J. I think it is clear that there should be an order for the production of documents, and an order on the defendants Houlder Brothers & Co. to shew in an affidavit what exertions they have made to procure the originals or copies; and, further, having regard to the peculiar character of this case, that they should be required, if the documents are not produced, to state what they know as to the contents of the policies, and as to the indorsements, because it seems to me that the documents must have been before those acting for the defendants upon the preparation of the defence.

The case is important because it appears to be necessary, as one would hardly expect it to be, to reiterate the statement of a well-established rule of law. It is an essential condition

(1) 2 Ex. D. 472.

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of a policy of insurance that the underwriters shall be treated with good faith, not merely in reference to the inception of the risk, but in the steps taken to carry out the contract. That being the meaning of the contract, effect is given to it by means of the order for discovery of ship's papers, and the affidavit with relation to them. In order that the underwriters should be on equal terms with the assured a stringent form of order for discovery has been long in use, to which the plaintiffs suing on a policy of marine insurance must swear. It is said that it makes all the difference as to the construction of such a contract that the action is brought, not against underwriters, but by them. It seems to me that in the latter case the plaintiffs are clearly entitled as in the former to refer to the nature of the contract as an indication of the extent of the information to which they are entitled.

The present claim is for overcharges made by Houlder Brothers & Co. against the underwriters. In answering that claim those defendants, in their statement of defence, alleged that they had discovered that there were certain items in respect of which there had been overcharges, and they paid a sum of money into court with a denial of liability. Upon that an application was made for particulars, the object of which was to ascertain the names of the underwriters who were said to have been overcharged, and the policies in respect of which those overcharges had been made. An order was made for that purpose; but the answer of the defendants was that it had been left to two gentlemen who were named to go into the matter, and upon their report a sum amounting to 10 per cent. of the whole amount had been paid into court. Upon that answer, which did not supply the information required, an application was made for the production of the policies for inspection. The object of this application was to get the information which was not obtained by the answer to the former order, but which would be obtained by inspection, because the amount of the claim was indorsed upon each policy, and the amounts paid were initialled by each underwriter. An objection is taken to any such order being made on the ground that the defendants are in the position of a defendant in an ordinary action

who is charged with improper or irregular conduct, and it is said is not bound to help the plaintiffs in any way.

The defendants Houlder Brothers & Co. were agents for a number of one-ship companies, and in that position they effected policies and received the insurance money; but those companies have gone into liquidation, and Houlder Brothers & Co. say that they can do nothing without the consent of the liquidator of the companies. The documents at one time during the liquidation must have been in court, but they are said to have been handed back to the liquidator, and so cannot be got at. A very clear explanation as to this matter is essential. The liquidator should occupy an impartial position, and, unless there is some reason for non-production, the documents ought to be produced, and if any reason exists the Court is entitled to know what it is. I agree, therefore, that the plaintiffs are entitled to an order for the production of the originals or copies of them, and to an explanation of the steps taken by Houlder Brothers to get the papers, and I am further of opinion that the order should direct them to say what they know as to the contents of the policies that they do not produce, and the indorsements on these policies.

I agree that the appeal must be allowed.

Appeal allowed.

Solicitors for plaintiffs: *Lewis & Lewis.*

Solicitors for defendants: *William A. Crump & Son.*

A. M.

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March 14.

[IN THE COURT OF APPEAL.]

SOCIÉTÉ GÉNÉRALE DU COMMERCE ET DE L'INDUSTRIE EN FRANCE *v.* JOHANN MARIA FARINA & CO.

Practice—Execution—Judgment against Company—Examination of Officer of Company—Officer who has retired—Order XLII., *r.* 32.

Where a judgment or order is obtained against a company for the recovery or payment of money, an order may be made under Order XLII., r. 32, upon a person who has been a director of a company, but has ceased to be so at the time of the making of the order, to attend to be examined as to debts owing to the company, and whether the company has property or means of satisfying the judgment or order.

APPEAL from an order of a judge at chambers.

The action was brought by the plaintiffs, who were a société anonyme, upon a bill of exchange accepted by the defendants. An appearance was entered as follows: "Enter an appearance for Compagnie d'Installation pour l'Eclairage et le Chauffage par Gaz à Bâle, a société anonyme trading as Johann Maria Farina et Cie., Gegenüber dem Josephsplatz, and sued as Johann Maria Farina & Co. in this action." On an application for judgment under Order XIV., Gottlob Emanuel Staenglen filed an affidavit on behalf of the defendants describing himself as a director of the Compagnie d'Installation mentioned in the appearance, and on his affidavit unconditional leave to defend was given. Subsequently the defendants withdrew their defence, and judgment was signed by the plaintiffs for the amount claimed in the writ and costs. The judgment not being satisfied, and the plaintiffs being unable to discover any asset of the defendants whereon to levy execution, an order was obtained directing the examination of the above-mentioned G. E. Staenglen as a director of the judgment debtors as to what debts were owing to them, and whether they had any and what property and means to satisfy the judgment debt. This order was not appealed from. G. E. Staenglen was served with this order, and attended before the examiner appointed under it. Upon

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his examination he admitted that he was, at the time when the judgment was obtained, a director of the Compagnie d'Installation, and that the firm of Johann Maria Farina & Co. was never registered as a company, but that the name was used by the Compagnie d'Installation. He then, on advice of his solicitor, refused to answer any further questions or to give any information as to the debts due to and the property of the Compagnie d'Installation or of Johann Maria Farina & Co., on the ground that he had ceased to be a director of the Compagnie d'Installation subsequently to the date of the judgment. The examiner ruled that G. E. Staenglen was bound to answer questions, and he was asked whether the acceptance sued on was in his handwriting, and on his refusal to answer the examination was adjourned.

The matter came before Phillimore J. upon an application to commit G. E. Staenglen for contempt of Court, and the learned judge made an order that he should attend at his own expense to be examined.

G. E. Staenglen appealed.

Höhler, in support of the appeal. Order XLII., r. 32, is limited, in the case of a corporation against which a judgment has been obtained, to the examination of officers of the corporation: *Irwell* v. *Eden*. (1) It is directed to the examination of persons who, as officers, are in a position to give information as to the property of the company at the time when the order is made. There is a strong contrast between the power so given and that of the Court to summon persons before it suspected of having property of the company, under s. 115 of the Companies Act, 1862, and the power under s. 8, sub-s. 3, of the Companies (Winding-up) Act, 1890, as to the examination of persons who have taken part in the promotion of a company. All that a former director of the company could say as to its property and assets would relate to the condition of the company when he ceased to be a director. It would be an extraordinary thing if a director who had resigned could be called upon to give evidence of the condition of the company

(1) (1887) 18 Q. B. D. 588.

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many years after his resignation took effect. [He referred to *Hood Barrs* v. *Heriot* (1) and *Republic of Costa Rica* v. *Strousberg*. (2)]

F. M. Abrahams, for the plaintiffs. The words of the rule, "any officer thereof," are not confined to present officers. The mere fact that an officer has resigned does not necessarily affect his power to give information, and no argument can be founded on the suggested case of a director who had resigned long before the order was made, as the application of the rule is discretionary. In this case Staenglen was, according to his own shewing, a director when the judgment was obtained, and he ought not to be allowed to defeat the ends of justice by a resignation which may have been for the purpose of avoiding examination.

Höhler, in reply.

COLLINS M.R. This is an appeal from a decision of Phillimore J., who made an order that G. E. Staenglen should attend at his own expense for the purpose of being examined. The action is brought against a firm of Johann Maria Farina & Co., and an appearance was entered for the defendants by a company alleged to be trading as Johann Maria Farina & Co. That appearance had the effect of substituting the company so appearing for the company named in the writ. In that action judgment was obtained in April, 1903, and an application was made under Order XLII., r. 32, which is entitled in the marginal note, "Examination of judgment debtor as to debts owing to him." The gentleman against whom the order was made has, by his own affidavit filed upon an application by the plaintiffs under Order XIV., declared that he was a person authorized to make the affidavit, and he further says in the same affidavit that he is a director of the company. He attended pursuant to the order, but when he came to a certain point in the examination he refused to go further because at that time he had ceased to be a director of the company. It is now contended that he had a right to do so because the order was wrongly made, and, the words of the rule being in the present tense,

(1) [1896] 2 Q. B. 338. (2) (1880) 16 Ch. D. 8.

there is no power to order the examination of any one who is not at the time an officer of the corporation against which the judgment had been obtained. I am of opinion that this construction which is sought to be put upon the rule is too narrow. There is nothing in the rule which restricts it to an existing officer of the corporation, and there is nothing in the wording of the rule incompatible with its application to a person who has been an officer of the corporation. The construction of the rule that is contended for might work serious injustice if an officer of a corporation merely by resigning his position could get rid of the responsibility of giving the information that is sought by a plaintiff. In the case before us we are not informed whether the requirements that would be necessary to complete the resignation of this gentleman as director have been carried out. But, however that may be, I think the suggested reading of the rule is too narrow, and that the rule is not restricted to persons who at the time when the order is made are officers of the corporation. It is quite clear that under the Companies Acts the power to obtain information from officers of the company is not so limited, but includes a person who was an officer of the company, but has technically ceased to be so by reason of the winding-up of the company. I think, therefore, that the order of the learned judge was right, and that the appeal must be dismissed.

MATHEW L.J. I am of the same opinion. At the time when the judgment was signed, Staenglen was a director of the company, and he remained so for some time afterwards. He alleges that he had ceased to be a director when the order for his examination was made, but he took no steps to set aside that order, and attended before the examiner. Without taking any technical view of the matter, we must consider whether if he had applied to set aside that order he would have been entitled to succeed. The object of Order XLII., r. 32, is to permit the examination of officers connected with a corporation as to its property and assets. I cannot see any reason why a company should escape liability to disclosure by accepting the resignation of a director, who might be the sole manager and

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the only person acquainted with details. I find nothing in the language of the rule which compels us to place on the rule an interpretation which would have that effect, and I see no reason why this order should not be enforced.

Appeal dismissed.

Solicitors for appellant: *John Carnegie.*

Solicitors for plaintiffs: *Michael Abrahams, Sons & Co.*

A. M.

1904 *March 2.*

WING, Appellant *v.* EPSOM URBAN DISTRICT COUNCIL, Respondents.

Local Government—Nuisance in respect of Drains—Order to abate—Necessity for Signature by two Justices—Public Health Act, 1875 (38 & 39 *Vict.* c. 55), s. 96.

An order of a Court of summary jurisdiction under s. 96 of the Public Health Act, 1875, must be signed by two justices.

Case stated by the chairman of the Surrey Quarter Sessions.

The appellant is the owner within the meaning of the Public Health Act, 1875, of certain premises at Epsom. In March and April, 1903, the respondents relaid the sewer with which the drains of these premises were connected, and served notice upon the appellant alleging a nuisance in respect of the drains and requiring certain works to be executed. The appellant did not comply with the notice, and complaint was thereupon made to a justice of the peace, who issued a summons requiring the appellant to appear before the Court of summary jurisdiction at Epsom. On the hearing of the summons on April 20, 1903, both parties being then present, an order was made by the Court of summary jurisdiction, three justices being then present and taking part in the hearing and determination. The appellant, on November 27, 1903, gave notice of appeal against the order on the ground that the order appealed from was bad on the face of it, inasmuch as it was made under the hand and seal of one justice only.

The order was in the following terms :—

"In the County Court of Surrey.

"Petty Sessional Division of Epsom.

"Before the Court of summary jurisdiction sitting at Epsom the 20th day of April, 1903, complaint was made on the 9th day of April, 1903, by Edward Robert Capon, of Bromley Hurst, Church Street, Epsom, inspector of nuisances to the Epsom Urban District Council, that in or on certain premises situated at 15, 14, 13, 12, and 11, Garden Cottages, Epsom, aforesaid, in the district under 'the Public Health Act, 1875,' of the Epsom Urban District Council, the following nuisance then existed, viz., a nuisance arising from want or defective construction of structural conveniences, that is to say arising from leaky drains, also drains not being intercepted from sewer, the discharge of sink wastes into closet pans, the absence of ventilation to drains, defective flushing cistern in each closet, and rain-water pipe connected directly with sewer, and that Walter James Wing (hereinafter called 'the defendant') is the owner of the premises on which the said nuisance arises. On hearing the said complaint it is ordered that the defendant within six weeks from the service of this order or a true copy thereof according to the said Act do take out the existing branch drains and construct new drains with stoneware pipes with watertight cement joints laid to proper falls in beds of cement concrete, properly intercepted from sewer, provided with efficient ventilation, with cast-iron pipes of a diameter not less than four inches, disconnect sink wastes from closet pans, and cause same to discharge into the open over a trapped stoneware gully, which shall be connected with the sewer, so that the same shall no longer be a nuisance or injurious as aforesaid.

"Signed. Wm. R. G. Farmer. (L. S.)
"Justice of the Peace for the
County aforesaid.

"Dated 20th day of April, 1903."

The Court of quarter sessions was of opinion that the order was valid and overruled the appellant's contention, but stated this case for the opinion of the Court.

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F. Low, K.C. (*W. W. Mackenzie* with him), for the appellant. The order is bad. Sect. 96 of the Public Health Act, 1875, requires that when the Court is satisfied that a nuisance exists it shall make an order for its abatement, and by s. 251, by which all matters arising under the Act are to be heard by a Court of summary jurisdiction, it is provided that the Court, when hearing or determining an information or complaint under the Act, "shall be constituted of two or more justices of the peace in petty sessions." Form C of Sched. IV. of the Act also shews that the order must be signed by two justices. [He referred to *Labalmondière* v. *Frost.* (1)]

Avory, K.C. (*S. G. Lushington* and *Swinburne Hanham* with him), for the respondents. The appeal to quarter sessions was from the oral decision of the justices in petty sessions and not from this order, which as a matter of fact had not been drawn up when notice of appeal was given.

But the signature of two justices is unnecessary. The order must no doubt be made by two or more justices; but if that is done the drawing up of the order is immaterial and is only needed for purposes of record: s. 14 of Summary Jurisdiction Act, 1848. It would be impossible to draw up the order on the spot, and there is no provision for so doing. The order is in the general form given in the schedule to the Summary Jurisdiction Rules, 1886, and those forms are to be of the same force as if they were contained in the Summary Jurisdiction Act, 1848: s. 12 of Summary Jurisdiction Act, 1884.

By s. 262 of the Public Health Act, 1875, proceedings are not to be quashed for want of form.

F. Low, K.C., was not called upon to reply.

LORD ALVERSTONE C.J. I confess that I should be glad if I could hold that this appeal fails. I have no doubt that the appellant knew that the order was made by two justices and appealed against it on the merits, and having failed on them he now raises this technicality. But although it is in one sense a technicality, an important principle is involved, and we must decide the case in accordance with the law. I have always understood that orders such as these were

(1) (1859) 28 L. J. (M.C.) 155.

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drawn up in order that, if necessary, objection might be taken to them on appeal. In the present case the objection taken to the form of the original order served upon the appellant on April the 20th was that it was bad on the face of it because it bore the signature of only one justice. If I could be satisfied that the signature of more than one justice was not necessary, or that the signature of the second justice was only required for purposes of verification, or that it was not necessary that the order should be drawn up and served at all, I should have come to a different conclusion. But I think the language of the Act is too strong, and I must say that it does seem to me an important principle that before proceedings to enforce an order are launched that order should be in accordance with the form provided by the statute and should be good on the face of it, especially when those proceedings may ultimately result in the infliction of penalties and costs. Sect. 96 of the Public Health Act, 1875, provides that where the Court is satisfied that an alleged nuisance exists, "the Court shall make an order" requiring the person responsible for it "to comply with all or any of the requisitions of the notice, or otherwise to abate the nuisance within a time specified in the order, and to do any works necessary for that purpose." I do not desire to lay too much stress on the words "within a time specified in the order." They are possibly consistent with the order being verbal, but they are more consistent with the order being in writing. Then s. 251 provides for matters arising under the Act being heard by a Court of summary jurisdiction, and provides that that Court "when hearing or determining an information or complaint under this Act shall be constituted of two or more justices of the peace in petty sessions sitting at a place appointed for holding petty sessions, or of some magistrate or officer for the time being empowered by law to do alone any act authorized to be done by more than one justice of the peace sitting at some court or other place appointed for the administration of justice." The form of order for abatement or prohibition of nuisance (Form C in Sched. IV. to the Act) recites the whole proceedings, and indicates in the plainest way that the order is to be made and to be signed by two justices.

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The only argument that can be advanced to the contrary is that under s. 14 of the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), it is provided that where a person has been convicted or has had an order made against him "a minute or memorandum thereof shall then be made, for which no fee shall be paid, and the conviction or order shall afterwards be drawn up by the said justice or justices in proper form under his or their hand and seal or hands and seals, and he or they shall cause the same to be lodged with the clerk of the peace to be by him filed among the records of the general quarter sessions of the peace." It is contended that that section shews that the sole object of drawing up the order was that there should be a record of it filed at the quarter sessions. As I think I have said before when we have had to consider this section, the fact that no fee is to be paid for drawing up the order or conviction looks as if a copy were to be given to the defendant so that he might know the terms of the order against him. I do not therefore think that s. 14 of the Act of 1848 is any authority for saying that the only object of drawing up the order is that it should be recorded.

It seems probable that many such orders may be made where the defendant has not appeared, or under circumstances where it is essential that the defendant should know exactly what he was called upon to do, and that it is right that the order should be served upon him in order that he may, if he thinks fit, take any objection to the proceedings.

In the present case the order in question on the face of it shews that it was signed by only one justice of the peace, and the mere fact that the appellant was aware that two justices were present when it was made is no sufficient answer to the objection that the order does not satisfy the terms of the statute.

I am obliged, therefore, although, as I have said, with reluctance, to come to the conclusion that this appeal must be allowed.

WILLS J. I am of the same opinion. It seems to me that Form C of Sched. IV. to the Public Health Act, 1875, makes it plain that the Legislature intended that such an order as

this should be drawn up in writing and should be served on the defendant. I am not embarrassed by the suggestion that it might not be possible to draw up the order at once. The magistrates' clerk is probably provided with forms, and he would only have to fill up a few blank spaces and get the signatures of the justices at once. As to that there seems no serious difficulty.

If the order is to be in writing, I cannot help thinking that it ought on the face of it to shew that it is properly made—that is to say, that it is made by two justices. It is not a mere form. It is part of the order. I can see no ground for suggesting that the signature of the second justice is merely required for the purposes of verification. In my opinion it forms part of the order itself. It is contended that the order is correct because it follows the general form given in the schedule to the Rules of 1886, and by s. 12 of the Act of 1884 a form authorized by any rules for the time being in force shall be of the same effect as if it was contained in the Summary Jurisdiction Act, 1848, and it is urged that we must look to the forms given in the schedule to the Rules of 1886 in the present case and must take the general form, and that that form is sufficient; but by rule 31 of the Rules of 1886 the forms in the schedule thereto or forms to the like effect may be used with such variations as circumstances may require. Therefore, where the regulations of the Public Health Act, 1875, require necessary alterations to be made, it is not sufficient to say that the form given by that Act is abrogated or qualified by the form given in the schedule to the Rules of 1886. It seems to me that two justices must make and sign the order, and that as that has not been done here the order is invalid, and the appellant is entitled to succeed.

KENNEDY J. I agree.

Appeal allowed.

Solicitors for appellant: *Spencer, Gibson & Son.*

Solicitors for respondents: *Lyell & Betenson, for Wilson, Epsom.*

A. P. P. K.

1904
March 4.

TOUGH, APPELLANT *v.* HOPKINS, RESPONDENT.

Local Government—Metropolis—Nuisance—Chimney sending forth Black Smoke—Funnel of Steam Tug—Specification in Order of Works to be Executed—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), s. 5, *sub-s.* 5; s. 24, *sub-s.* (*b*).

By s. 24 (*b*) of the Public Health (London) Act, 1891, "any chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such quantity as to be a nuisance" is liable to be dealt with summarily:—

Held, that the funnel of a steam-tug was a chimney within the section.

An abatement or prohibition order is not bad because it does not, under s. 5, sub-s. 5, of the Act, specify the works to be executed for the purpose of abating or preventing the recurrence of the nuisance, although the person on whom the order is made may have required them to be specified.

CASE stated by an alderman of the City of London.

The appellant was charged under s. 24 of the Public Health (London) Act, 1891, for that on August 24, 1903, between Custom House and Southwark Bridge on the north side of the river Thames in the City of London, and within the port of London, upon a certain vessel—to wit, the SS. *Richmond*—a nuisance existed, namely, a chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such a quantity as to be a nuisance; and that the appellant, being the owner of the vessel, had made default in complying with the requisitions of a notice dated April 25, 1903, served upon him under s. 24 of the Public Health (London) Act, 1891, requiring him to abate the nuisance and to execute such works and do such things as might be necessary for that purpose.

On the hearing of the information the following facts were proved or admitted by the appellant:—

The appellant was the owner of a steam-tug known as the *Richmond*. On April 25, 1903, a notice was served upon him at the instance of the port sanitary authority of London which required him within forty-eight hours from the service of the notice to abate a nuisance on the above-mentioned steam-tug arising from a chimney, to wit, the funnel of the boiler furnace

on the tug (not being the chimney of a private dwelling-house), sending forth black smoke in such quantity as to be a nuisance.

On August 24, 1903, the tug was towing six barges, and was proceeding from below the Custom House to Southwark Bridge and beyond, within the limits of the port sanitary authority, and while the tug was proceeding between the Custom House and Southwark Bridge there was being sent forth from the funnel thereof dense black smoke for about five minutes in such quantity as to be a nuisance.

The steam-tug was being navigated by a master engineer and crew employed by the appellant, who was not on board, and had no personal knowledge of such emission of black smoke.

The engines and boiler of the tug were of modern construction, and were constructed so as to consume as far as possible all the smoke caused therein, having regard to the funnel being a short one, and adapted for passing under bridges at high-water level by hinging backwards nearly to deck level.

The appellant had given strict instructions to his servants to prevent as far as possible the production of black smoke on the tug, and good Welsh steam coal procured by the appellant was burnt on board. The furnaces of the tug had been freshly stoked with such coal at about opposite the Custom House, and from three to four minutes was not an unreasonable time to allow the fresh fuel to cease emitting black smoke on such a vessel.

The emission of smoke from the funnel of the tug could have been prevented by the fire being kept bright by frequent and careful stoking.

The alderman found as a fact that the funnel of the tug was a chimney within the meaning of s. 24 of the statute, and that black smoke had been sent forth from it in such quantities as to be a nuisance at the place and time mentioned in the information. He also found that no works that could be ordered would cure the alleged nuisance, but that it was a question of stoking with proper fuel, and that if a bright fire were kept up by frequent and careful stoking the nuisance could be prevented. He was of opinion that the information

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was properly laid under s. 24 (*b*) of the Public Health (London) Act, 1891, and convicted the appellant, and made a prohibition order against him under sub-ss. 4 and 5 of s. 5 of the Public Health (London) Act, 1891, but refused (although required by the appellant) to specify any works in the said order, because it was not, in his opinion, desirable to do so.

The questions for the opinion of the Court were whether the appellant was rightly convicted, and whether the prohibition order was a good and valid order under sub-ss. 4 and 5 of s. 5 of the Public Health (London) Act, 1891.

J. A. Hamilton, K.C. (*Bigham* with him), for the appellant. Sect. 24 (*b*) of the Public Health (London) Act, 1891, has no application to the funnel of a steam-tug. The section clearly refers to chimneys properly so called, and nuisances by emission of smoke from steamers on the Thames are dealt with by s. 23, sub-s. 3. If the word "chimney" in s. 24 (*b*) included funnels there would be no need for the former section. Although, no doubt, the powers and duties of a sanitary authority arising under s. 24 are assigned by the order of the Local Government Board of March 25, 1892, to the port sanitary authority, that of itself would not make this section apply to the funnels of tugs. The prohibition order was invalid, since it did not specify, as is required by s. 5, sub-s. 5, the works to be executed for the purpose of preventing the recurrence of the nuisance.

R. Cunningham Glen (*Danckwerts, K.C.*, with him), for the respondent. The prosecution took place under the Local Government Board Order of March 25, 1892, which assigned to the port sanitary authority all the powers of a sanitary authority under the Public Health (London) Act, 1891, created by or arising out of (inter alia) s. 24 of that Act, so far as those sections are applicable to a port sanitary authority, and to ships, vessels, boats, or persons within their jurisdiction. By the 3rd clause of that order, "for the purposes of the aforesaid sections any vessel lying within the district of the said port sanitary authority shall be subject to the jurisdiction of the said authority as if it were a house."

Sect. 23, sub-s. 3, of the Act requires every furnace used in the working of a steamer on the Thames to consume its own smoke. It therefore deals with user, and not with nuisance. Sect. 24 (*b*) relates solely to nuisance from the emission of black smoke. It cannot be said that the sections are mutually exclusive.

[He was stopped.]

Bigham replied.

LORD ALVERSTONE C.J. In my opinion this decision was right. I quite agree that the order of the Local Government Board of March 25, 1892, has not increased the responsibility of persons who own tugs in respect of nuisances from tugs or ships. It merely provided that the port sanitary authority was to take such proceedings as could be taken under the Act in respect of "ships, vessels, boats, waters, or persons within their jurisdiction . . . ." and it includes s. 24. The mere inclusion of s. 24 in that order would not increase the responsibility if s. 24 does not apply to the chimney or funnel of a steam-tug plying on the Thames. The point has admitted of argument, and there is some ground for thinking at the first blush that the wording of s. 24 would indicate that it was intended to apply to chimneys on land in the ordinary sense of the word; but when we look at the object of the legislation and at certain expressions in s. 24 itself, I think any such construction would be too narrow. It is, as far as this part of the section is concerned, essentially what may be called a black smoke section—that is to say, it is a section which provides that "Any chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such a quantity as to be a nuisance" shall be a nuisance liable to be dealt with summarily. Sect. 23, the previous section, has undoubtedly dealt specifically with the steam-engines and furnaces used in the working of steam vessels which were being worked in the district where this tug was being worked. It provides that they "shall be constructed so as to consume or burn the smoke arising from such engine and furnace; and if any such steam-engine or furnace is not so constructed, or

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being so constructed is wilfully or negligently used so that the smoke arising therefrom is not effectually consumed or burnt, the owner or master of such vessel shall be liable to a fine not exceeding five pounds, and on a second conviction to a fine of ten pounds"; then, "Provided that in this section the words 'consume or burn the smoke' shall not be held in all cases to mean 'consume or burn all the smoke,' and the Court hearing an information against a person may remit the fine if of opinion that such person has so constructed his furnace as to consume or burn, as far as possible, all the smoke arising from such furnace, and has carefully attended to the same, and consumed or burned, as far as possible, the smoke arising from such furnace." Those two sub-sections shew that they are special provisions with regard to the construction of furnaces and engines upon the steamers and the non-negligent user of them, but it is to be observed that there is a corresponding provision with regard to furnaces upon land, because sub-s. 1 of s. 23 also provides that the furnaces employed in the working of engines by steam and a number of other furnaces, all of which must be on land, "shall be constructed so as to consume or burn the smoke arising from such furnace"; and then there is a corresponding provision with regard to negligent user. Therefore we have, in s. 23, with regard to both furnaces on land and furnaces on ships, a provision which is directed to the proper construction of the engines and furnaces and their non-negligent user. Then we come to s. 24, which is unquestionably a nuisance section. I think it is not without importance that it immediately follows s. 23, and is under the same heading, "Smoke Consumption." If the words to which I am about to refer can be fairly applied to a chimney on board a steamship, there is no reason why the section should not apply. The first provision of s. 24 says: "Any fireplace or furnace which does not so far as practicable consume the smoke" shall be a nuisance liable to be dealt with summarily. Then comes the important clause: "Any chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such a quantity as to be a nuisance" shall be a nuisance liable to be dealt with

summarily. I think that that sub-section, quite apart from negligence, is meant to deal with the case, which has not been covered by the previous sub-section, of a chimney other than that of a dwelling-house sending forth black smoke. We have had our attention directed to the other legislation of a similar character with regard to railway engines and with regard to traction engines, and there does not appear to be any black smoke nuisance section in any of them. Therefore one would rather assume that this legislation is something which may be said to be additional protection and to be superadded to the legislation with regard to construction, and unless the words, "Any chimney (not being the chimney of a private dwelling-house)," are sufficiently strong to shew that a steamship would not be included, I think both the purview of this section and the object of the legislation would point to black smoke being emitted from the chimney or funnel of a steamer within the port as constituting an offence.

It is quite obvious there may be cases in which the black smoke would come from a chimney which would not ordinarily be called a funnel. I do not think any argument can be based upon the fact that the word "chimney" is used, because the word "funnel" is a technical and almost secondary term for that kind of chimney. I cannot see any reason why emission of black smoke from steamers constantly plying on the Thames should not be as much prevented as the emitting of black smoke from chimneys on land. I therefore come to the conclusion that s. 23 does not contain the whole code with regard to nuisance coming from steamships or smoke coming from steamboats, and that s. 24 does include the chimney of a steamship. Therefore I think this conviction was right.

Upon the second point I ought perhaps just to say we held the other day, and I think we were right in holding so, that an order under this Act was not bad, because it did not specify works to be done, though the defendant asked for the specification of them, if there was no necessity for works in order to prevent the nuisance. I do not think that objection prevails. This appeal should be dismissed.

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KENNEDY J. I am of the same opinion. To my mind the only point, which certainly is not wholly free from difficulty, is the question as to whether s. 24 (*b*), "Any chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such a quantity as to be a nuisance," includes the funnel of a tug-boat or steamer. Usually, no doubt, "chimney" is a word applied to that through which smoke passes from a fire of some sort in a building. It is not a term which is technically the proper term to describe those passages or funnels on a steamboat which convey the smoke from its furnace to the upper air; but I see nothing to prevent "chimney" being here used in what one may call a natural sense, namely, that of being a passage by which smoke from a fire is carried away into the outer air. Otherwise there would be no "black smoke section," as my Lord has shortly described it, with regard to a thing which may send out smoke in quite as great quantities and may cause quite as great a nuisance as what is more commonly described by the word "chimney," namely, the smoke passage from the roof of a building. There is no definition clause relating to the word "chimney" in this Act, and if the word is not defined, it seems to me that we ought to treat it as intended to include here that which it may include in a natural though not in a technical sense.

On the second point I need not add anything to that which my Lord has said.

CHANNELL J. I agree. I think "chimney" in this section is used simply as the thing from which smoke issues into the outer air. It might well be that the funnels of steam vessels, or funnels of locomotive engines or other movable smoke-producing apparatus, might be so dealt with elsewhere in the Act as to lead one to the conclusion that they were not intended to be included in the general words in s. 24 (*b*), but in fact the operation of s. 24 is only to apply the particular summary procedure to certain cases of smoke nuisance. Sect. 23 deals with the construction and user of apparatus producing smoke, and does not deal, as s. 24 does, with the consequences or results of it.

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The result seems to me to be that s. 24 and s. 23 are dealing, not with different subject-matters, but with different consequences of the same subject-matter, and there is no reason, therefore, because steam vessels are specially dealt with under s. 23 to say they cannot come under s. 24. I see no reason for cutting down what seems to me the primary meaning of the word "chimney" in s. 24.

Appeal dismissed.

Solicitor for appellant: *John A. Roberts.*
Solicitor for respondent: *The City Solicitor.*

A. P. P. K.

HILL, APPELLANT *v.* PANNIFER AND OTHERS, RESPONDENTS.

1904
March 4.

Distress — Poor-rate — Reasonable Costs of selling Distress — Distress (Costs) Act, 1817 (57 *Geo.* 3, *c.* 93), *s.* 1, *Schedule — Distress (Costs) Act*, 1827 (7 *&* 8 *Geo.* 4, *c.* 17)—*Distress for Rates Act*, 1849 (12 *&* 13 *Vict. c.* 14), *s.* 1.

The schedule to 57 Geo. 3, c. 93, as applied by 7 & 8 Geo. 4, c. 17, to distress for poor-rate, in so far as it prescribes a maximum limit in respect of the costs of sale of the distress, is impliedly repealed by 12 & 13 Vict. c. 14, s. 1, which gives the justices power to order that the levy shall include "the reasonable charges of taking, keeping, and selling of the said distress."

CASE stated by justices.

On September 24, 1903, a complaint was preferred by the appellant against the respondents for having sold or caused to be sold certain goods of the appellant to satisfy a poor-rate for the parish of Bildeston, in the county of Suffolk, and certain costs and charges, and for having retained and taken from the produce of the sale of such goods greater costs and charges than are mentioned and set down in the schedule to the Distress (Costs) Act, 1817 (57 Geo. 3, c. 93), to wit, a charge of 14*s.* for the expenses of an auctioneer, contrary to the provisions of that statute and of the Distress (Costs) Act, 1827 (7 & 8 Geo. 4, c. 17), and of the Distress for Rates Act, 1849 (12 & 13 Vict. c. 14).

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It was proved on the hearing of the complaint that the respondent Pannifer was the assistant overseer, and the other respondents the overseers, of the poor for the parish of Bildeston. On July 2, 1903, Pannifer obtained from two justices a distress warrant against the appellant directing him to distrain on the appellant's goods, and to sell them if within five days after making the distress the sum of 1*l.* then due and owing from the appellant in respect of poor-rate and the sum of 5*s.* 1*d.*, the costs of obtaining the warrant, were not duly paid by the appellant. Pannifer, acting under the warrant, duly distrained upon the goods, and demanded the payment of the moneys above referred to. On July 13 the appellant paid to Pannifer the sum of 1*l.* 4*s.* 1*d.*, being the sum of 5*s.* 1*d.* in respect of the costs of the warrant and 19*s.* in respect of the poor-rate, but declined to pay the balance of 1*s.* claimed to be due in respect of the poor-rate. On July 28 Pannifer, as directed by the warrant, sold the goods distrained to satisfy the unpaid balance of the rate, and after the sale gave to the appellant a statutory notice of costs and charges as required by the Distress (Costs) Act, 1817 (57 Geo. 3, c. 93). The sum realized by the sale was 1*l.* 5*s.*, from which Pannifer took and retained, in addition to the sum of 1*s.* for the rate, the following costs and charges: levy, 3*s.*; taking, keeping, and use of room, &c., 6*s.* 3*d.*; auctioneer, 14*s.*; and he paid the balance of 9*d.* to the appellant.

The sum of 14*s.* was one-third of a fee of two guineas paid by Pannifer to an auctioneer in respect of the sale at one time of the goods of the appellant and of two other ratepayers against whom distress warrants had been granted.

Pannifer acted throughout under the authority of the other respondents.

It was contended for the appellant that the costs and charges to which the respondents were entitled were limited by the statute (the Distress (Costs) Act, 1817), as applied to the levy of a distress in respect of poor-rate by the Distress (Costs) Act, 1827, and that the charge of 14*s.* for the auctioneer's fee was an excessive and illegal charge. The appellant further contended that 12 & 13 Vict. c. 14 did not entitle the respondents

to reimburse themselves by appropriating any higher or other costs or charges than those which were authorized by the Distress (Costs) Act, 1817, as applied to proceedings for the recovery of poor-rates.

On behalf of the respondents it was contended that the words of 12 & 13 Vict. c. 14, s. 1, and the express provisions of the warrant of distress which cited those words, entitled them (notwithstanding the earlier provisions of the Distress (Costs) Acts, 1817 and 1827) to deduct and retain from the proceeds of the sale of the appellant's goods, costs and charges, to wit, in the words of the Act, "the reasonable charges of selling," in excess of and other than those specified in the schedule to the Distress (Costs) Act, 1817, and that the last-mentioned statute must be considered as pro tanto revoked and amended. The justices were of opinion that the respondents' contention as to the effect of the statute 12 & 13 Vict. c. 14, s. 1, was right, and they found that the charge of 14*s.* was a reasonable and proper charge, and one which by law could properly be made in the circumstances of the case, and therefore dismissed the complaint, and stated this case for the opinion of the Court. (1)

(1) By the Distress (Costs) Act, 1817 (57 Geo. 3, c. 93), "Whereas divers persons acting as brokers and distraining on the goods and chattels of others or employed in the course of such distresses have of late made excessive charges . . . . be it therefore enacted . . . . that from and after the passing of this Act no person whatsoever making any distress for rent where the sum demanded and due shall not exceed the sum of 20*l.* for and in respect of such rent . . . . shall have, take, or receive out of the produce of the goods or chattels distrained upon and sold . . . . any other or more costs and charges for and in respect of such distress or any matter or thing done therein than such as are fixed and set forth in the schedule hereunto annexed . . . ."

The schedule contained the following item: "Catalogues, sale, and commission and delivery of goods, one shilling in the pound on the net produce of the sale."

By the Distress (Costs) Act, 1827 (7 & 8 Geo. 4, c. 17), "Whereas by an Act passed in the 57th year of the reign of his late Majesty King George III. . . . . certain regulations are made with respect to the costs and charges of levying and disposing of . . . . distresses where the sum demanded and due shall not exceed 20*l.*, and whereas it is expedient that the said Act should be amended by extending the same to distresses for other causes, be it therefore enacted . . . . that from and after the passing of this Act all the rules, regulations, clauses, provisions, penalties, matters

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Robson, K.C. (*Bruce Williamson* with him), for the appellant. The magistrates were wrong. The amount of the costs of "taking, keeping, and selling" the distress is fixed by the schedule to 57 Geo. 3, c. 93, at 1*s.* in the pound on the net produce of the sale. The 57 Geo. 3, c. 93, is not repealed by 12 & 13 Vict. c. 14, but, when the later statute refers to "reasonable charges of taking, keeping, or selling" the distress, it implies that they shall be reasonable within the limit fixed by the earlier statute.

The 18 Geo. 3, c. 19, empowered justices to award the costs of complaints, but there was then no provision as to the costs of distresses. That was given by 57 Geo. 3, c. 93, which by 7 & 8 Geo. 4, c. 17, was extended to distresses for poor-rate. The 11 & 12 Vict. c. 43, s. 36, repeals so much of 18 Geo. 3, c. 19, as relates to costs of complaints, and there was therefore then no power to justices to give costs of complaints, though they could still give costs of distresses. The next year 12 & 13 Vict. c. 14 was passed, and the main object of that Act was to provide for costs of complaints, and the meaning of s. 1 is that the costs of complaints should be added to the reason-

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and things in the said Act contained shall extend and be construed to extend and shall be applied and put in execution so far as the same are applicable and capable of being put in execution with respect to any distress or levy which shall be made for any . . . . poor's-rates . . . . in all cases where the sum demanded and due for or in respect of such . . . . rates . . . . shall not exceed the sum of 20*l.* . . . ."

By the Distress for Rates Act, 1849 (12 & 13 Vict. c. 14), "Whereas provision is already made by law for the recovery of the sum or sums at which any person is rated or assessed to the relief of the poor . . . . by distress and sale of his goods and chattels . . . . but no provision is made for levying the costs and expenses incurred by the overseers of the poor . . . . in the recovery of the same . . . . be it therefore enacted . . . . that it shall be lawful hereafter for all justices of the peace if in their discretion they shall so think fit in any warrant of distress they shall make and issue for the levying of any sum or sums to which any person . . . . may hereafter be rated or assessed in or by any rate or assessment for the relief of the poor . . . . to order that a sum such as they may deem reasonable for the costs and expenses which such overseers . . . . shall have incurred in obtaining the same shall also be levied of the goods and chattels of the person or persons against whom such warrant shall be granted, together with the reasonable charges of the taking, keeping, and selling of the said distress."

able costs of distresses, which were already provided for by 57 Geo. 3, c. 93. The words in the section, "reasonable charges of taking, keeping, and selling," mean reasonable within the maximum allowed by the schedule to 57 Geo. 3, c. 93. [He referred to *Moyse* v. *Cocksedge* (1); *Ex parte Arnison*. (2)]

Walter Stewart (*Nolan* with him), for the respondents. The provisions as to the costs of sale in case of distress for poor-rate which were given by 57 Geo. 3, c. 93, as applied to poor-rate by 7 & 8 Geo. 4, c. 17, have been superseded by 12 & 13 Vict. c. 14.

By the Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21), s. 8, power is given to the Lord Chancellor to make rules for regulating the fees, charges, and expenses in and incidental to distresses. This shews that the scale of charges prescribed by the Act of George III. was not supposed by the Legislature to be still in force. [He referred to *Lumsden* v. *Burnett*. (3)]

Robson, K.C., replied.

LORD ALVERSTONE C.J. I am of opinion that this appeal fails. We have to construe s. 1 of 12 & 13 Vict. c. 14. The preamble of that Act says: "Whereas provision is already made by law for the recovery of the sum or sums at which any person is rated or assessed to the relief of the poor . . . . by distress or sale of his goods and chattels, and in default of such distress by commitment to prison until the same shall be paid, but no provision is made for levying the costs and expenses incurred by the overseers of the poor . . . . in the recovery of the same." If it be a just criticism to say that that is not an accurate recital because strictly it should only have referred to the costs of the issuing of the summons, I do not think that this affects the true construction of the enacting words. Of course the preamble may be looked at, and ought to be looked at, as a guide to any construction which is doubtful, or to decide between two constructions which may

(1) (1748) Willes, 636. (2) (1868) L. R. 3 Ex. 56.
(3) [1898] 2 Q. B. 177.

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be put upon the words. It seems to me that there is here a clear enactment that "it shall be lawful hereafter for all justices of the peace if in their discretion they shall so think fit in any warrant of distress they shall make and issue for the levying of any sum or sums to which any person or persons is or are now or may hereafter be rated or assessed in or by any rate or assessment for the relief of the poor . . . . or in any warrant for the levying of any arrears of the same, to order that a sum such as they may deem reasonable for the costs and expenses which such overseers . . . . shall have incurred in obtaining the same shall also be levied of the goods and chattels of the person or persons against whom such warrant shall be granted." That deals with the particular point that Mr. Robson said had been left unprovided for by the existing enactments, "together with the reasonable charges of the taking, keeping, and selling of the said distress." The warrant of distress follows the wording of the statute, and says: "Together with the reasonable charges of taking and keeping the said distress, and, if they shall not be paid, then you do sell the said goods and chattels, rendering the overplus on demand, the reasonable charges of taking, keeping, and selling the said distress being first deducted." It is contended that the scale of charges provided by 57 Geo. 3, c. 93, was still in force, as extended to distress for poor-rate by 7 & 8 Geo. 4, c. 17. The provisions of the Act of George III. were extended by 7 & 8 Geo. 4, c. 17, to distresses in respect of a great many other rights. It was applied to distress for land tax, assessed taxes, church rates, tithes, highways rates, sewer rates, and any other rates, taxes, impositions, and assessments whatever where the sum demanded was less than 20*l*. Therefore it may be regarded as a general statute. It is, however, suggested that the provision of 12 & 13 Vict. c. 14, s. 1, as to the reasonable charges of taking, keeping, and selling a distress for poor-rate means one of two things: either reasonable charges within the statutory maximum, or statutory charges. In my opinion, to support such a contention much clearer words are necessary than are to be found in this statute, and there needed much clearer expressions of an indication that

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the whole charges were to be within the statutory maximum fixed by the Act of George III. It would have been quite easy for the Legislature to have used language limiting the charges so that they should not exceed those that were already provided in respect of the levying of distress by virtue of the earlier statutes. I cannot help feeling that 12 & 13 Vict. c. 14 is a special statute with regard to poor-rates. It does not seem to me that the same considerations apply when you are dealing with the overseers of the poor, who are to a certain extent public unpaid officers, as when you are dealing with the charges of brokers, as was the case in the earlier statutes. It is admitted that the charges here incurred by the overseers in selling the goods would be charges which would be broker's charges under the earlier Acts; but I can well imagine the Legislature in dealing with poor-rate intended to give the overseers, subject to the charges being reasonable, a protection against all the costs and charges which they might have to pay. I am satisfied that the construction contended for has never yet been put upon the charges which have been allowed to be levied under summons for poor-rates, and I can find no trace of authority for the contention that, in regard to 12 & 13 Vict. c. 14, the maximum scale of 57 Geo. 3, c. 93, was intended to apply. I think the statute did mean to say that the overseers of the poor should be entitled to have their reasonable charges for keeping, levying, and selling goods. The magistrates have found that the charge of 14*s.* is a reasonable charge, and as in my opinion the intention of the Legislature was that the overseers should have their reasonable charges, I think this appeal should be dismissed.

KENNEDY J. On the whole, though not, I confess, without great doubt, I think that the view my Lord has taken is the preferable one. It is not very easy in many cases where there is no direct reference in a later Act to an earlier Act, but the later Act contains directions or enactments which seem at any rate to differ from those in the earlier Act, to say whether the proper inference is that the later Act had repealed the earlier Act so far as those directions or enactments are

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Kennedy J.

concerned, or whether one ought not to find some way in which both statutes can be applied to a certain extent—the one merely being treated as modifying the other. An argument which, I confess, has impressed me is this: That while 12 & 13 Vict. c. 14 provides that the magistrates may make an order for a distress which shall include the reasonable charges of taking, keeping, and selling the chattels seized, yet that ought to be read with an Act which has certainly never been specifically repealed, 57 Geo. 3, c. 93, and the later Act 7 & 8 Geo. 4, c. 17, which in cases of distress for poor-rate, amongst other things, have enacted that the charges of taking, keeping, and selling the distress shall not exceed a certain sum. It is suggested that the fair construction of the latest Act is that the charges are to be reasonable, but not to exceed those which by those two Acts of George III. and George IV. have been thought by the Legislature to be sufficient. It is true that even the later of those two Acts is now an old Act, and the costs and charges will and must vary from time to time; but on the other hand it does seem to me that there is a good deal to be said in favour of the appellant's argument. Where Parliament passes a later Act without reference to an earlier Act, and that earlier Act is one which has been in force for a long time, and is, therefore, well known, it seems reasonable that we should try to construe the two consistently if it is possible to do so. The question is, Is it right for us to do so in this case? Another and perhaps a weightier argument in the appellant's favour was this. In regard to poor-rate, it affects a number of poor people—people not of great means, people with regard to whom Parliament as long back as these earlier statutes has given a protection in the form of a limitation of the costs of distress. Apparently, if the respondents prevail, the procedure for questioning the reasonableness of the charges has now disappeared so far as the magistrates are concerned, and the right of a person who has had unreasonable charges forced upon him in the levying could only be vindicated by bringing an action to recover money which had been obtained from him by a sort of duress. Still I think on the whole we ought to draw the conclusion that the Legislature intended

to pass an enactment which is inconsistent with the earlier legislation. It is difficult to understand why in the later Act, if it was intended to retain an old and well-known maximum, the statute did not go on to provide "the reasonable charges of taking, keeping, and selling shall be charges not exceeding those at present by law allowed." The Legislature has not said that. On the whole I think that we must consider the earlier sections, so far as the maximum limit of charges of a distress for poor-rate is concerned, to have been repealed.

CHANNELL J. I agree. I think the only question we have to consider is whether the words of the operative part of the statute 12 & 13 Vict. c. 14, are inconsistent with the continued existence of a statutory limit of the charges in respect of these distresses which had previously existed.

It seems to me that they are. It is inconsistent with there being a maximum limit of charges to say that a man is to have his reasonable costs. The present case shews it. There are costs which do exceed that maximum limit, and which are found to be in point of fact reasonable. It seems to me, therefore, that the later statute is necessarily inconsistent with the continued existence, not of the other statute as a whole, but of the other statute as applicable to distress for poor-rate, which is the subject of this case.

Appeal dismissed.

Solicitors for appellant: *Lloyd-George, Roberts & Co., for Birkett, Ridley & Francis, Ipswich.*

Solicitors for respondents: *Salmon & Sons, Bury St. Edmunds.*

A. P. P. K.

C. A.
1904
March 14.

[IN THE COURT OF APPEAL.]

MOORE, NETTLEFOLD & CO. *v.* THE SINGER MANUFACTURING COMPANY.

Landlord and Tenant—Distress—Sale by Auction of Goods distrained—Purchase by Landlord—2 Will. & M. Sess. 1, *c.* 5, *s.* 2—*Practice—Appeal from County Court—Leave to appeal to High Court—Right to appeal on leave to Court of Appeal—Supreme Court of Judicature* (*Procedure*) *Act*, 1894 (57 *&* 58 *Vict. c.* 16), *s.* 1, *sub-s.* 5.

A sale, in pursuance of 2 Will. & M. Sess. 1, c. 5, s. 2, of goods distrained must be a sale to a third party, and if the landlord purchase the goods himself no property passes.

Judgment of the Divisional Court, [1903] 2 K. B. 168, and dictum of Blackburn J. in *King* v. *England*, (1864) 4 B. & S. 782, affirmed.

In an action in the county court, where the leave of the judge to appeal to the High Court is required, the giving of leave creates a right of appeal within s. 1, sub-s. 5, of the Supreme Court of Judicature (Procedure) Act, 1894, and a further appeal lies to the Court of Appeal by leave of the Divisional Court hearing the appeal or of the Court of Appeal.

APPEAL from the judgment of a Divisional Court, reported [1903] 2 K. B. 168, upon an appeal from a decision of the judge of the Shoreditch County Court.

The action was brought to recover a sewing machine which the plaintiffs claimed as their property. It appeared that the defendants were makers of sewing machines, and they let one to a tenant of the plaintiffs on a hire-purchase agreement, which contained a clause providing that the defendants should have power to seize the machine if the instalments were in arrear. The rent of the premises let to the tenant by the plaintiffs became in arrear, and they put in a distress, and seized the sewing machine among other things. At a sale by auction of the goods distrained, the manager of the plaintiffs bought the sewing machine on their behalf. The plaintiffs then relet the machine to their tenant on a hire-purchase agreement. The instalments due under the original hire-purchase agreement of the defendants having fallen into arrear,

they seized the sewing machine under the authority of that agreement. This action was brought in the county court against them for conversion in so doing.

The county court judge held that the sewing machine was lawfully bought by the plaintiffs, and that the property in it passed to them on the sale, and gave judgment in their favour, but he gave leave to appeal to the High Court.

The defendants appealed.

Upon the appeal the Divisional Court, Lord Alverstone C.J., Wills and Channell JJ., held that the property in the sewing machine had not passed to the plaintiffs on the sale by auction, and judgment was given for the defendants. (1)

The Court refused leave to appeal, and the plaintiffs applied to the Court of Appeal for leave, which was granted.

The plaintiffs accordingly appealed, and on the hearing of the appeal—

Hugo Young, *K.C.*, and *Lawless*, for the defendants, took a preliminary objection to the appeal. In this case there was no appeal from the county court without leave, owing to the smallness of the amount involved; but the judge, thinking that the case involved an important question of principle, gave leave to appeal, and the case accordingly was heard on appeal by the Divisional Court, who refused leave to appeal. This Court, upon the application of the plaintiffs, gave leave to appeal under the Supreme Court of Judicature (Procedure) Act, 1894, s. 1, sub-s. 5; but it is submitted that the case is not within the sub-section, and therefore the Court of Appeal had no power to give leave under it. The sub-section only applies to cases in which there was an appeal as of right from the inferior Court. Therefore this case is governed by the Judicature Act, 1873, s. 45, and there is no appeal, the Divisional Court having refused leave. The words of sub-s. 5 are practically identical with those of the County Courts Act, 1888, ss. 120, 121, and in those sections it is clear that the right of appeal contemplated is one which exists as of right at the commencement of the action.

(1) [1903] 2 K. B. 168.

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[They cited *Hawkins* v. *Great Western Ry. Co.* (1); *In re Oddy* (2); *Wynne-Finch* v. *Chaytor* (3); *Godman* v. *Moses.* (4)]

Montague Lush, K.C. (with him *Lincoln Read* and *Arthur Page*), for the plaintiffs. It is submitted that sub-s. 5 of s. 1 of the Supreme Court of Judicature (Procedure) Act, 1894, is obviously meant to apply to all cases which, when the question as to the procedure on appeals becomes material, can be the subject of appeal. The Act was meant to introduce a uniform procedure as to appeals, whereas the construction contended for by the defendants would introduce the anomaly that in a case which the county court judge thinks of such importance as to justify an appeal, the Court of Appeal would not have power to grant leave to appeal. Where leave to appeal is given in the county court, there is a right of appeal within the meaning of the sub-section. The antithesis implied is between cases which are appealable whether without leave, or by reason of leave given, and cases which are not appealable. [He cited *Daglish* v. *Barton.* (5)]

COLLINS M.R. I think the preliminary objection to the appeal fails. When one looks to see what point of time sub-s. 5 of s. 1 of the Supreme Court of Judicature (Procedure) Act, 1894, is concerned with, which may be gathered from the context, it is obvious that it is not concerned with the initial stage of the action, but with the time when the question arises what Court is to deal with an appeal from an inferior Court. At that time there will be cases which have been tried in an inferior Court, and in which there has been all along a right of appeal without leave, and cases in which there was no right of appeal without leave, but in which leave to appeal has been given. The sub-section is concerned, I think, with all cases which are appealable, whether without leave or by reason of leave having been given. For all those cases provision has to be made, and the sub-section provides accordingly for them. The words "in all cases where there is a

(1) (1895) 14 The Reports, 360.
(2) [1895] 1 Q. B. 392.
(3) [1903] 2 Ch. 475.
(4) (1900) 69 L. J. (Q.B.) 823.
(5) [1900] 1 Q. B. 284.

right of appeal to the High Court" speak, as it seems to me, with reference to the time when the hearing of the appeal comes in question, not to that of the original hearing in the inferior Court. An argument was founded on similar words in the County Courts Act, 1888, ss. 120, 121, which must necessarily refer to the inception of the action. It is perfectly true that the words are similar, but they are used in a different context and with reference to another point of time. In this case leave to appeal having been given, it was, in my opinion, a case in which there was a right of appeal within the meaning of the Supreme Court of Judicature (Procedure) Act, 1894, s. 1, sub-s. 5.

ROMER L.J. I am of the same opinion. In order to see whether the case is one in which there is a right of appeal within the meaning of the sub-section, I think one must look at the point of time when the Divisional Court is constituted under the sub-section as the tribunal for the purpose of hearing such appeals. In a case where there is no appeal from an inferior Court without leave, if a party to an action appeals without leave, of course he has no right to appeal, but, if he has obtained leave, then he has a right of appeal.

MATHEW L.J. I agree. I think there are two classes of cases coming within the sub-section: those in which leave to appeal was not necessary, and those in which it was necessary; but, leave having been obtained, the case stands on the same footing as if there had been a right of appeal ab initio.

Upon the argument of the appeal—

Montague Lush, K.C., and *Arthur Page* (with them *Lincoln Reed*), for the plaintiffs. Two objections are raised to the title of the plaintiffs to this machine: first, that a transaction such as that relied on would open the door to abuses; and, second, that there was no sale in law. As to the first objection there is nothing to make it applicable to this case. There is a wide distinction between a private sale and a sale by auction. In the latter case it is an advantage that the landlord should not

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be shut out from bidding, for he might be more interested than any one else in retaining the goods on the premises, and in general an extra bidder would raise the price. As to whether there was a sale, the Divisional Court decided on the authority of *King* v. *England*. (1) In that case the preliminaries to a sale had not been properly carried out, and the attention of the Court was not directed to what would be the effect of a landlord acquiring the goods on a sale by auction. Further, it is submitted that the landlords were not selling to themselves. The sale was by an auctioneer who is agent of both parties, for directly the bid is accepted the auctioneer becomes the agent of the purchaser: *Emmerson* v. *Heelis*. (2) In *Rex* v. *Cotton* (3) it is pointed out a "distrainer neither gains a general or special property, nor even a possession, in the things distrained; cannot maintain trover or trespass; for they are in custody of law by act of distrainer." If the plaintiffs had no property in the goods, there could be no valid objection that they sold to themselves, and the judgment of the county court judge was right.

Hugo Young, K.C., and *Lawless*, for the defendants. The landlord need not sell by auction; so that if the contention for the plaintiffs is right he could sell privately to himself. Even if there is an auction the landlord can select the auctioneer and the place of sale and give directions, which would be inconvenient to every one but himself. A private agreement between a landlord and a tenant as to goods of a third party is not effectual except as to the tenant's own goods. Though the property in goods does not pass under a distress to the landlord, he is selling, by virtue of the statute, the goods of another person, and cannot himself be purchaser. Before appraisement was done away with a landlord could not himself appraise the goods distrained: *Rocke* v. *Hills*. (4) *King* v. *England* (1) is exactly in point, and the evils of permitting the landlord to buy were pointed out in that case. All those abuses might arise in such a case as the present; and it is against public

(1) 4 B. & S. 782.
(2) (1809) 2 Taunt. 38, at p. 48; 11 R. R. 520, 523.
(3) (1751) 2 Ves. Sen. 287, at p. 294.
(4) (1887) 3 Times L. R. 298.

policy that a landlord, in any case, should be allowed to sell to himself whether by auction or otherwise.

Arthur Page, in reply.

COLLINS M.R. This is an appeal from a decision of a Divisional Court, and the question arises out of a distress for rent put in by the plaintiffs as landlords. Among the goods seized was a sewing machine which had been hired by the tenant from the defendants upon a hire-purchase agreement. Under the distress that was put in this machine was sold by public auction, and an agent employed by the landlords bought it apparently at a fair price, and they relet it on the hire-purchase system to the tenant. Thereupon the defendants, who had originally owned the machine and let it to the tenant, seized it for default of payment of instalments under their agreement. The landlords thereupon brought this action, and the question is whether the landlords had on the sale by auction acquired a property in the machine. The case appears to me to be on all fours with *King* v. *England* (1), the only difference being that in that case an appraisement was necessary, and the landlord, who was the person authorized by s. 2 of 2 Will. & M. Sess. 1, c. 5, to sell the goods, took over the goods of a third person which had been distrained at the appraised value and with the consent of the tenant, and thus stood in the position both of buyer and seller. He then gave them to the plaintiff, and thereupon the true owner followed and seized them. The action was brought to recover the goods, and the question arose which is the same as that in the case before us. It was there held that the transaction with respect to the goods did not vest the property in them in the landlord. The difference between the cases is that here there was the formality of a sale by auction; but the substance of the cases is the same, namely, a sale by a landlord to himself. It is true, as has been suggested, that the auctioneer may be for some purposes the agent of both parties; but in selling he is the agent of the landlord who sold, though later on he might become for some purposes the agent of the buyer. It appears

(1) 4 B. & S. 782.

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then that the same mischief arises in such a case as the present as would arise in a case like *King* v. *England* (1) by the landlord being himself both buyer and seller. As was pointed out by Blackburn J. in that case and by Wills J. in the present one, to hold that a landlord might sell to himself would open the door to abuses. It seems to me, both on principle and authority, that the judgment of the Court below was right. The appeal must therefore be dismissed.

MATHEW L.J. It has been suggested that the law applicable to this case is no older than the decision in *King* v. *England* (1); but, turning to the statute of William and Mary, it is clear that where a landlord, empowered to sell, himself buys the goods it is not a proper description of the transaction to call it a sale. It is suggested that in this case there was a sale by the auctioneer. He, however, was not an independent vendor; he was the agent of the landlord for the purposes of selling, but with a superadded authority as agent for the purchaser to make a binding record of the sale to him. The case comes clearly within the authority of the decision in *King* v. *England* (1), and I agree that the appeal must be dismissed.

Appeal dismissed. (2)

Solicitor for plaintiffs: *G. D. Wansbrough.*
Solicitor for defendants: *James Morley.*

(1) 4 B. & S. 782.
(2) Heard by consent before two members of the Court of Appeal.

A. M.

THE KING *v.* JUDGE WHITEHORNE.

1904
March 2.

County Court—Jurisdiction—Sale of Equity of Redemption—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 67.

Sect. 67 of the County Courts Act, 1888, gives the county court jurisdiction in actions for specific performance of any agreement for the purchase of any property where the purchase-money shall not exceed the sum of 500*l.* In an action in the county court for specific performance of an agreement to purchase for 75*l.* some leasehold property which was of the value of more than 500*l.*, but was subject to a heavy charge:—

Held, that the action was within the jurisdiction of the county court, since the test was the actual purchase-money to be paid, and not the value of the property subject to the charge.

RULE NISI for a mandamus to the county court judge of Birmingham to hear and determine an action.

The action was brought on the equity side of the county court for specific performance of a contract to purchase some leasehold house property from the trustee under a deed of assignment. The property in question was subject to a charge of about 1100*l.*, and the contract was to buy it subject to this charge. The total value of the property was about 1500*l.*, but the actual purchase-money was 75*l.*

The county court judge refused to try the case, holding that he had no jurisdiction to do so, since he considered that the property that was bought was the whole property subject to the mortgage, and was of the value of 1500*l.*, and that the ad valorem stamp on the conveyance would therefore be on that amount. (1)

H. Sutton, for the county court judge, shewed cause against the rule. The judge rightly thought that the limit provided

(1) By the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 67, "The Court shall have and exercise all the powers and authority of the High Court in the actions or matters hereinafter mentioned; (that is to say) . . . .

"(4.) For specific performance of or for the reforming, delivering up, or cancelling of any agreement for the sale, purchase, or lease of any property where in the case of a sale or purchase the purchase-money, or in the case of a lease the value of the property, shall not exceed the sum of five hundred pounds."

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by s. 67, sub-s. 4, of the County Courts Act, 1888, had been exceeded. This was the sale of an equity of redemption, and in such a case it is not the actual purchase-money appearing on the face of the contract which is the criterion, but the purchase-money as used in the sense of the Stamp Acts. The Act in force when the County Courts Act, 1888, was passed was 33 & 34 Vict. c. 97, by s. 73 of which, "Where any property is conveyed to any person in consideration, wholly or in part, of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a charge or incumbrance upon the property or not, such debt, money, or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the conveyance is chargeable with ad valorem duty." The consideration, therefore, for this contract would not be 75*l.*, but an amount which would certainly be more than 500*l.*, and so beyond the limit of the jurisdiction of the county court.

The fact that a limit is provided shews that it was not the intention of the Legislature that the county court should determine questions where large landed interests were at stake.

M'Cardie, in support of the rule. The expression "purchase-money" in s. 67, sub-s. 4, of the County Courts Act, 1888, must be taken in its ordinary and natural meaning, and there is no ground for reading into it the special meaning given in the Stamp Acts. The section is a general section, and refers not only to the sale of interests in land, but to the sale, purchase, or lease of any property, and it is noteworthy that a distinction is drawn between the criterion of limitation in regard to sale or purchase, which is "the purchase-money," and that in respect of a lease, which is "the value of the property." The county court judge here has ignored that distinction, and has treated this case as though the value and not the purchase-money was the test. The Act assumes that the parties have fixed the value of the property to themselves by agreeing upon the amount of the purchase-money, and if it appears that the transfer of the property will involve larger interests, there is

power under s. 126 of the County Courts Act, 1888, for the Court or a judge to remove the matter into the High Court.

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LORD ALVERSTONE C.J. I can well understand the learned county court judge raising this point, for I think it may require further consideration, whether or not it was intended or is desirable that a county court judge should have jurisdiction in a case where the purchase-money of an equity of redemption is below the 500*l.*, but the value of the property which is actually being transferred subject to a charge may be very much larger. It seems to me that in this question of undoubted difficulty the only safe rule that we can follow is to give the natural construction to the language of the section, and that we ought not to put an artificial construction upon it unless we are driven to the conclusion that the Legislature has used the words in a limited sense. As has been pointed out, the section is a general section relating to all classes of property, and including chattels as well as real property; therefore it is not specially directed to the cases in which the purchase-money of land only would be the subject of consideration. It seems to me that as the section contemplates all kinds of things being sold, land, chattels, interests of all kinds, shares, choses in action, and so on, we must assume primâ facie that the words "purchase money" refer to the price of that which was the subject of the purchase and sale; and to a certain extent that view is fortified by the following words, "or in the case of a lease the value of the property." That seems to create an exception where the Court could not ascertain any standard of purchase-money. Under those circumstances, though it may be that indirectly the county court has been given (subject, of course, to the power of removal under s. 126) a jurisdiction over cases in which the property in question may be of a much greater value than 500*l.*, it would not be safe to put an artificial construction on the words "purchase money" in the section, and we must read the words as referring to the actual purchase-money of the subject-matter of the contract sought to be reformed or cancelled. The facts of this case shew that what was being sold here was the equity of redemption,

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Lord Alverstone C.J.

and that the agreed purchase-money for it was 75*l.*, and that, therefore, the learned county court judge had jurisdiction; and I think it is not immaterial, as has been pointed out, that there are powers of removal under s. 126 which can be exercised if it should turn out that the interest in very valuable property is at stake. I quite follow the line of argument, which impressed the county court judge, that for a long period of years, whenever property has been sold subject to any charge, for the purposes of the stamp duty, the consideration or purchase-money has been taken to be the total amount including the charge. I do not, however, think that the stamp duty statutes can be said to be in pari materiâ with the County Courts Act, but whether they be so or not, if it was intended to draw the distinction, it should have been done in clearer language than is used in this section, and I feel constrained to give the natural meaning to the words "the purchase-money," and to say that the county court judge had jurisdiction. If the county courts have a jurisdiction which they ought not to have, that must be altered by amending the Act.

WILLS J. I am of the same opinion. It appears to me that there is nothing to guide us as to the meaning of the Legislature except the words they have used in the specific sub-section, because to my mind the Stamp Acts do not throw any light upon it. The Stamp Acts are Revenue Acts, and they are generally framed with a view to getting as much out of the subject as can possibly be got, and therefore it is very natural that they should use language which will cover, as the amount upon which duty is to be charged, the whole value of property, including that sum by which its real value is diminished, which is the charge upon it. Therefore I do not feel that the Stamp Acts give me any assistance whatever. Then there is only one safe rule, I think, to apply in construing an Act of Parliament where we have nothing except the bare words, and that is to give them their natural meaning. "Property" is a very large word, and certainly would include an equity of redemption, and I think, if anybody were asked

with respect to this transaction what property was being sold, his answer would be, the equity of redemption. But then that is made rather more clear, I think, by the use of the words "the purchase-money." That means the purchase-money for the property, and the reference to the purchase-money, I think, makes the sum which has been agreed to be given between the parties the standard of what the property is worth—the property which is the subject of sale; and in that way throws a reflected light upon the interpretation which ought to be given to "property." I think, therefore, that this really was a contract for the sale of the equity of redemption for 75*l.*, and it is therefore within the jurisdiction of the county court judge.

KENNEDY J. I am of the same opinion. It seems to me very much as my brother Wills has put it, that the proper rule in this case is to follow the natural and fair meaning of the words as used in the section. If anybody had said in this case, "What money was the equity of redemption purchased for?" the answer would have been, "75*l.*" If the purchase-money does not exceed a certain limit the county court judge has jurisdiction. In this case, as it seems to me, that limit was not reached.

Rule absolute.

Solicitors for applicant: *Field, Roscoe & Co., for Sherwin & Rogers, Birmingham.*

Solicitor for county court judge: *The Solicitor to the Treasury.*

A. P. P. K.

1904
March 9, 14.

[IN THE COMMERCIAL COURT.]

ELLINGER & CO. AND ANOTHER *v.* MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

Insurance (Life)—Policy—Warranty not to commit Suicide—Condition Precedent—Policy for Benefit of Third Party.

In an application to the defendants for a policy of life insurance, which application was to be part of the contract, one F. warranted and agreed that he would not commit suicide, whether sane or insane, during the period of one year from the date of the contract. The policy, which was issued in consideration of the application, was expressed to be for the benefit of the plaintiff company, who were creditors of F. F. committed suicide within the year, while temporarily insane:—

Held, that the policy was avoided, and that the plaintiffs could not recover upon it.

ACTION tried before Bigham J. in the Commercial Court without a jury.

The action was brought on a policy of life insurance for 4000*l.* issued by the defendants to one Max Firnberg.

On May 23, 1902, Firnberg signed an application addressed to the defendants for a policy of 4000*l.* for five years on his own life. The application stated:—

"This application made to the Mutual Life Insurance Company of New York is the basis and a part of a proposed contract for insurance . . . . I hereby agree that all the following statements and answers and all those that I make to the company's medical examiner in continuation of this application are by me warranted to be true and are offered to the company as a consideration of the contract which I hereby agree to accept . . . . The full name of the person to whom the insurance is payable is Ellinger & Co., Manchester . . . . The insurable interest of the said beneficiary in the life proposed for insurance other than that of family relationship is to cover debt . . . . I hereby warrant and agree that during the next two years following the date of issue of the contract of insurance for which application is hereby made, I will not

travel or reside in any part of the torrid zone, or north of the parallel of 60° north latitude in the Western Hemisphere, or north of the parallel of 70° north latitude in the Eastern Hemisphere, and will not engage in any of the following extra hazardous occupations or employments—retailing intoxicating liquors, handling electric wires and dynamos, blasting, mining, submarine labour, aeronautic ascensions, the manufacture of highly explosive substances, service upon any railroad, train, or track, or in switching or in coupling cars, or on any steam or other vessel, unless written permission is expressly granted by the company. I further warrant and agree that I will not engage in any military or naval service in time of war during the continuance of the said contract without first obtaining written permission from this company. I also warrant and agree that I will not commit suicide, whether sane or insane, during the period of one year from the date of the said contract."

On May 24, 1902, the policy was issued to Firnberg. It commenced with the following words: "In consideration of the application for this policy, which is hereby made a part of this contract, the Mutual Life Insurance Company of New York promises to pay . . . . unto Ellinger & Co. . . . . creditors of Max Firnberg . . . . their successors or assigns 4000*l.* . . . . upon . . . . proof of the death of the said Max Firnberg, provided such death takes place within the term of five years from the date hereof . . . . The half annual premium of 56*l.* 16*s.* 8*d.* shall be paid in advance on the delivery of this policy, and thereafter to the company at its principal agency in Great Britain on the 24th day of November and May in every year during the continuance of this contract until premiums for five full years shall have been duly paid to the said company."

In February, 1903, while the policy was still in force, Firnberg committed suicide while temporarily insane. At the time of entering into the policy and at the time of his death he owed more than 4000*l.* to Ellinger & Co. His executor joined with them as a co-plaintiff in this action, suing as trustee for them.

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ELLINGER & Co. v. MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

C. A. Russell, K.C., and *Cababé*, for the plaintiffs. The policy being made in favour of the plaintiffs, they have the right to sue upon it. The clause as to not committing suicide was not a condition which avoids the policy, but merely a personal warranty or independent agreement in respect of which the defendant company may have a remedy by an action for damages against Firnberg's estate. His suicide does not, however, avoid the policy. If it was intended that it should have that effect it ought to have been put into the policy in express terms: *Stoneham* v. *Ocean Railway and General Accident Insurance Co.* (1); *Hambrough* v. *Mutual Life Insurance Co. of New York* (2); *Fowkes* v. *Manchester and London Life Assurance Association.* (3) Suicide while insane cannot be treated as a voluntary act: it is an accident or misfortune.

[They also referred to *Cawley* v. *National Employers' Accident and General Assurance Association* (4); *Llanelly Railway and Dock Co.* v. *London and North Western Ry. Co.* (5)]

Haldane, K.C., and *S. A. T. Rowlatt*, for the defendants. The meaning of this contract of insurance is that the stipulation not to commit suicide within a year goes to the very event against which the insurance is effected. The suicide of Firnberg, therefore, avoided the policy altogether, and not merely as against himself. The undertaking not to commit suicide, therefore, is a condition precedent of the policy: *Barnard* v. *Faber* (6); *Newcastle Fire Insurance Co.* v. *Macmorran* (7); *Hambrough* v. *Mutual Life Insurance Co. of New York.* (2)

C. A. Russell, K.C., replied.

Cur. adv. vult.

March 14. The following judgment was read by

BIGHAM J. On May 23, 1902, Max Firnberg signed an application addressed to the defendant company for a policy of insurance for 4000*l.* for five years on his own life. The material parts of the document are as follows: "This application

(1) (1887) 19 Q. B. D. 237.
(2) (1895) 72 L. T. 140.
(3) (1863) 3 B. & S. 917.
(4) (1885) Cababé & Ellis, 597.
(5) (1873) L. R. 8 Ch. 942.
(6) [1893] 1 Q. B. 340.
(7) (1815) 3 Dow, 255; 15 R. R. 67.

made to the Mutual Life Insurance Company of New York is the basis and a part of a proposed contract for insurance. . . . . I hereby agree that all the following statements and answers and all those that I make to the company's medical examiner in continuation of this application are by me warranted to be true and are offered to the company as a consideration of the contract which I hereby agree to accept. . . . ." Then follow twenty numbered statements, beginning with name of the applicant. The ninth statement is as follows: "The full name of the person to whom the insurance is payable is Ellinger & Co., Manchester." The twelfth statement is as follows: "The insurable interest of the said beneficiary in the life proposed for insurance other than that of family relationship is *to cover debt*." The words in italics are written. After these statements there are three clauses in the following words: "I hereby warrant and agree that during the next two years following the date of issue of the contract of insurance for which application is hereby made, I will not travel or reside in any part of the torrid zone, or north of the parallel of 60° north latitude in the Western Hemisphere, or north of the parallel of 70° north latitude in the Eastern Hemisphere, and will not engage in any of the following extra hazardous occupations or employments—retailing intoxicating liquors, handling electric wires and dynamos, blasting, mining, submarine labour, aeronautic ascensions, the manufacture of highly explosive substances, service upon any railroad, train, or track, or in switching or in coupling cars, or on any steam or other vessel, unless written permission is expressly granted by the company. I further warrant and agree that I will not engage in any military or naval service in time of war during the continuance of the said contract without first obtaining written permission from this company. I also warrant and agree that I will not commit suicide, whether sane or insane, during the period of one year from the date of the said contract." The question in this case is as to the meaning and effect of the last of these three clauses, which refers to suicide. The policy was issued on May 24, 1902. It begins with these words: "In consideration of the application for this policy, which is

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hereby made a part of this contract, the Mutual Life Insurance Company of New York promises to pay . . . . unto Ellinger & Co. . . . . creditors of Max Firnberg . . . . their successors or assigns 4000*l*. . . . . upon . . . . proof of the death of the said Max Firnberg, provided such death takes place within the term of five years from the date hereof . . . . upon the following condition, and subject to the provisions, requirements, and benefits stated on the back of this policy, which are hereby referred to and made part hereof. The half annual premium of 56*l*. 16*s*. 8*d*. shall be paid in advance on the delivery of this policy and thereafter to the company at its principal agency in Great Britain on the 24th day of November and May in every year during the continuance of this contract until premiums for five full years shall have been duly paid to the said company." A number of provisions are printed on the back of the policy, only one of which need be referred to. It is as follows: "Military and naval service of any kind, the volunteer service of Great Britain and Ireland in time of peace excepted, whether as combatant or non-combatant, without permission in writing, signed by one of the officers of the company is prohibited under this contract." I have read the different so-called warranties and provisions, because the plaintiffs rely upon them as shewing in some way that the clause as to suicide was merely intended to operate as an independent promise and not as a limitation of the defendants' liability. It appears that when Firnberg took out this policy he owed money to Ellinger & Co. for some business debt. In November, 1902, Ellinger & Co. were pressing for payment of this debt, and then for the first time Firnberg told them that by way of securing the payment of their debt he had effected this policy. In February, 1903, Firnberg, during a fit of insanity, committed suicide. On November 25, 1903, this action was brought upon the policy against the defendant company, the plaintiffs being Ellinger & Co., the creditors, and Richard Schlesinger, the executor of Firnberg's will, who is described as suing as trustee for Ellinger & Co. Firnberg died insolvent owing Ellinger & Co. 4000*l*. or more. The plaintiffs contend that the policy must be regarded as having been taken out by Firnberg on their behalf, and that

they are therefore entitled to ratify and recover on it, and they say that the clause as to suicide amounts to nothing more than a personal undertaking by Firnberg, for the breach of which the defendants' remedy is limited to a claim against Firnberg's bankrupt estate. On the other hand, the defendants contend that the effect of the clause is to exclude liability on their part if death was due to suicide. I am of opinion that the defendants' contention is the right one. The policy was made by the defendants with Firnberg and with no one else. It is in no sense a contract with Ellinger & Co. Firnberg alone was responsible for the payment of the premiums. Neither subsequent notice to Ellinger & Co. of its existence nor ratification of it by them can alter or affect its original meaning. What, then, did the parties, Firnberg and the defendant company, intend when they inserted the warranty that Firnberg should not commit suicide? I think it is clear that they intended that in the event of suicide the company should not be liable on the policy. It does not matter whether the clause is called a warranty or not. It constitutes a limitation of the defendants' liability. Death within five years is the event upon the happening of which the defendants are to pay, but death by suicide within the first twelve months is excluded. Apt words have been used to express this intention, and it is, I think, impossible to read the clause as merely giving to the company a cross-claim against the estate of the deceased for damages.

Judgment for the defendants.

Solicitors for plaintiffs: *G. Trenam, for Addleshaw, Sons & Co., Manchester.*

Solicitors for defendants: *Freshfields.*

A. P. P. K.

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[IN THE COURT OF APPEAL.]

TAYLOR AND OTHERS *v.* HAMSTEAD COLLIERY COMPANY.

Employer and Workman—Compensation—Negligence—Acceptance of Scheme under Workmen's Compensation Act, 1897—*Effect on Right to sue independently of Act—Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42)—*Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-s.* 2 (*b*); *s.* 3, *sub-s.* 1.

A workman who had joined a scheme duly certified by the Registrar of Friendly Societies under s. 3, sub-s. 1, of the Workmen's Compensation Act, 1897, received fatal injuries, alleged to have been caused by the personal negligence of his employers, or of some person for whose act or default his employers were responsible. After the workman's death his legal personal representatives brought an action to recover damages under the Employers' Liability Act, 1880:—

Held, reversing the judgment of the Divisional Court, that the contract by the workman that the provisions of the scheme should be substituted for the provisions of the Act was an exercise of the option given to him by s. 1, sub-s. 2 (*b*), of the Act to claim compensation under the Act, and was a bar to the claim to the recovery by his representatives of damages under the Employers' Liability Act, 1880.

APPEAL from a decision of the judge of the Birmingham County Court.

The action was brought under the Employers' Liability Act, 1880, by the legal personal representatives of a deceased workman to recover damages for fatal injuries caused by the alleged negligence of the defendants, or some person for whose act or default they were responsible. At the trial a preliminary objection was taken on behalf of the defendants to the maintenance of the action, on the ground that the plaintiffs had accepted the benefits of a scheme certified by the Registrar of Friendly Societies under s. 3, sub-s. 1, of the Workmen's Compensation Act, 1897, and that therefore, under s. 1, sub-s. 2 (*b*), of that Act, the action would not lie. Evidence was then called in order to raise the preliminary point, and in the result the county court judge found the following facts: (1.) That in connection with the business of the defendants there was a duly certified scheme of compensation, benefit, or insurance

within the meaning of s. 3, sub-s. 1, of the Workmen's Compensation Act, 1897. (2.) That the deceased had accepted the scheme willingly and under no compulsion whatever, and with full knowledge of its terms, in substitution for and in the place of the benefits which he might claim under the Workmen's Compensation Act. (3.) That there was a legal and effectual contract between the deceased workman and the defendants. (4.) That the plaintiffs had received up to the previous week, were still receiving, and would in future receive the full benefits of the scheme thus contracted for. At the conclusion of the arguments the learned judge held that the compensation under the scheme was compensation under s. 3 of the Workmen's Compensation Act which the deceased had elected to claim, if and when occasion arose; and the employers, who were in fact paying that compensation to his legal personal representatives, were not liable both to pay compensation under the scheme and also to proceedings under the Employers' Liability Act. He therefore held that the action would not lie, and dismissed it. The applicants appealed. (1)

Jan. 18. *J. Wilson*, for the plaintiffs. The county court judge was wrong in deciding the preliminary objection in

(1) By s. 1, sub-s. 2 (*b*), of the Workmen's Compensation Act, 1897, "When the injury was caused by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act, or take the same proceedings as were open to him before the commencement of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act . . . ."

By s. 3, sub-s. 1, "If the Registrar of Friendly Societies, after taking steps to ascertain the views of the employer and workmen, certifies that any scheme of compensation, benefit, or insurance for the workmen of an employer in any employment, whether or not such scheme includes other employers and their workmen, is on the whole not less favourable to the general body of workmen and their dependants than the provisions of this Act, the employer may, until the certificate is revoked, contract with any of those workmen that the provisions of the scheme shall be substituted for the provisions of this Act, and thereupon the employer shall be liable only in accordance with the scheme . . . ."

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favour of the defendants. By s. 1, sub-s. 2 (*b*), of the Act of 1897 the workman has the option of claiming compensation under that Act, or of taking any proceedings which were open to him before the Act came into operation, including, of course, proceedings under the Employers' Liability Act, 1880. In the present case the deceased workman never exercised that option. No option can be exercised before an injury occurs, and the mere fact that the deceased was a member of the scheme would not have prevented his recovering damages under the Act of 1880 had he survived. The power given by s. 3, sub-s. 1, of the Act of 1897 to employers and workmen to contract with each other that the provisions of a scheme duly certified by the Registrar of Friendly Societies shall be substituted for the provisions of that Act applies only to the Workmen's Compensation Act, and prevents a workman who has accepted a scheme from getting compensation under that Act. It has no reference to an action under the Employers' Liability Act, although it may possibly be that payments made under a scheme should be deducted from the damages awarded in the action.

C. E. Allan, for the defendants. The preliminary objection was sound. The acceptance of the benefits of the scheme by the plaintiffs, as personal representatives of the deceased workman, is a bar to any action under the Employers' Liability Act. It is true that in an ordinary case, where an accident is due to the employer's negligence, the workman has a remedy at common law or under the Employers' Liability Act or the Workmen's Compensation Act, subject only to the limitation that he cannot pursue more than one of his remedies. If he proceeds under the Workmen's Compensation Act, he exercises his option, and cannot pursue another remedy. If he is a member of a duly certified scheme, he cannot proceed under the Workmen's Compensation Act, for by s. 3, sub-s. 1, the scheme is substituted for the provisions of that Act; he has in that case only the option of taking the benefit of the scheme or proceeding under the Employers' Liability Act. But he cannot do both; and where he accepts the benefits of the scheme he exercises his option, and cannot afterwards sue under the Act.

The option may be as effectively exercised by the workman's representatives after his death as by the workman himself during his life, for by s. 7, sub-s. 2, "any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative or to his dependants, or other person to whom compensation is payable."

WILLS J. The point for our consideration has been clearly put in argument, and arises thus. A person who complains of injury arising from the personal negligence of his employer, or from an act for which his employer is responsible and which gives rise to a right of action, has ordinarily, under s. 1, sub-s. 2 (*b*), of the Workmen's Compensation Act, 1897, a choice of two remedies—the remedy of an assessment of compensation under that Act, or the remedy by means of a common law action, including in that term an action under the Employers' Liability Act. But it is said that, although the plaintiffs have not exercised any option by taking proceedings under the Workmen's Compensation Act, to the exclusion of their right to proceed under the Employers' Liability Act, they have availed themselves of a scheme in which the deceased had joined and to the benefits of which he was entitled; that this scheme would have excluded the operation of the Employers' Liability Act, and that therefore the matter stands on the same footing as though the plaintiffs had taken proceedings under the Workmen's Compensation Act. No doubt the Legislature might have said so, if it pleased, but it has not; and we are asked to take a leap without any satisfactory grounds for taking it, and to hold that the Act of Parliament puts the benefits received under a scheme entered into between an employer and his workmen on the same footing as the taking of proceedings under the Workmen's Compensation Act. But from the language of s. 3, sub-s. 1, it seems that this was not the intention of the Legislature. A claimant cannot obtain compensation from his employer under, and also independently of, the Act. But benefits received under the scheme are not compensation received under the Workmen's Compen-

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sation Act, and that is really the answer to the argument on behalf of the defendants. The provisions of the scheme are to be substituted for the provisions of the Act; therefore compensation has not been received under the Act, but otherwise by reason of the substitution. The Registrar of Friendly Societies must necessarily consider whether the scheme is on the whole favourable to the workman, for there may be schemes which would not provide compensation on the scale contemplated by the Act. In the present case we are certainly not justified in reading into the Act a qualification which is not to be found in it. The case must go back for a new trial. On the question of damages, I think, speaking for myself, that the amount received under the scheme ought to be taken into consideration in their assessment.

KENNEDY J. My brother Wills has so clearly expressed my own view that I will only add that I am not quite sure whether the insurance scheme would afford an answer on the question of the quantum of damages or not.

Order for new trial.
Leave to appeal.

W. J. B.

The defendants appealed.

March 8. *Shakespeare*, for the defendants. The workman, had he lived, would have been entitled to compensation under the scheme, and his representatives are now entitled in the same way. The scheme derives its validity from the Act, and compensation received under the scheme cannot be said to have been received independently of the Act. It must, therefore, be received under the Act, and if so s. 1, sub-s. 2 (*b*), takes effect, and bars any other proceeding to recover compensation. *Edwards* v. *Godfrey* (1) shews clearly that the option to be exercised is the choice of alternatives. Sub-s. 4 of s. 2 is an exception to the rule in favour of the workman, who can, if he fails in an action under the Employers' Liability Act, ask, then and there but not later, as is shewn by the case cited, for

(1) [1899] 2 Q. B. 333.

compensation under the Workmen's Compensation Act. If he does so the expense of the abortive proceeding may be deducted, but if the workman is not barred from his alternative remedy he might proceed with it without any deduction from his claim. In *Beckley* v. *Scott & Co.* (1) the Court of Appeal in Ireland did not follow *Edwards* v. *Godfrey* (2), but both in that Court and in the Court below there was a diversity of opinion. There is this distinction between that case and the present one—that in that case the action was unsuccessful; while in the present the plaintiffs are entitled to compensation under the scheme. Apart from the Act, it is a general principle that a man cannot be made to pay twice over for the same wrong. If it were open to the plaintiffs to recover damages in this action, they could only do so by accounting for the money that they have received by bringing the whole of it into court.

J. Wilson, for the plaintiffs. The acceptance of the scheme is not an exercise of the option given in s. 1, sub-s. 2 (*b*). That section is directed to cases where the injury is caused by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible. In such a case, to give any effect to the section, there must be an opportunity to exercise the option, and that opportunity can only arise when the injury is incurred. The scheme itself does not express that the workmen who join it are contracting themselves out of the Act, and as it does not express this it cannot estop either the workman or his representatives from proceeding either under the common law or the Employers' Liability Act. The whole object of a scheme certified under s. 3 of the Act is to provide a substitute for the provisions of the Act. It would be, without doubt, an answer to proceedings under the Act; but a proceeding under a scheme is entirely different from a proceeding under the Act, and therefore the contrast in s. 1, sub-s. 2 (*b*), between a claim for compensation under the Act and a claim independently of the Act does not apply. It is not disputed that money received under the scheme ought to be taken into account in estimating the damages in this action. There would be no difficulty in

(1) [1902] 2 I. R. 504. (2) [1899] 2 Q. B. 333.

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doing so, but the receipt of that money is no bar to this action.

Shakespeare, in reply.

COLLINS M.R. This is an appeal from a decision of a Divisional Court overruling the judgment of a county court judge.

The plaintiff, who was a workman, met with an injury, which caused his death, while he was in the employment of the defendants, and the action is brought by his personal representatives under the Employers' Liability Act upon an allegation of negligence on the part of the defendants, or of some person for whom they are responsible. It appeared at the hearing that there was, at the colliery where the deceased was working, a scheme of compensation under s. 3 of the Workmen's Compensation Act, 1897, which the deceased had joined. The point taken before the county court judge was that the scheme that the deceased had joined was an answer to the action, on the ground that the defendants were not liable to pay compensation under the scheme, and also to proceedings under the Employers' Liability Act.

The section of the Workmen's Compensation Act, 1897, on which the decision of the Divisional Court turned is s. 1, sub-s. 2 (*b*). That section expresses that the remedy of a workman under that Act and his remedy apart from that Act, where the injury to him is caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, are not concurrent, but separate, and the workman is given an option to proceed in either mode. That the exercise of the option is conclusive was decided by this Court in *Edwards* v. *Godfrey*. (1) It is pointed out by A. L. Smith L.J., who delivered the leading judgment, that the workman who had brought a common law action had failed in it; and that but for the provisions of s. 1, sub-s. 4, of the Act there would have been an end of any claim by him against his employer. That sub-section, as the Lord Justice pointed out, gives him a locus pœnitentiæ by enabling him to

(1) [1899] 2 Q. B. 333.

apply to the county court judge before whom the action is tried to assess compensation under the Workmen's Compensation Act. That application must, however, be made at the time, and the workman cannot at a subsequent date initiate independent proceedings against his employer by a request for arbitration under the Workmen's Compensation Act. That is a clear decision of this Court that the two proceedings are not concurrent.

I turn now to s. 3 of the Act, which provides that where there is a scheme of compensation, benefit, or insurance for the workmen of an employer, the provisions of the scheme shall be substituted for the provisions of the Act. Certain conditions must exist in the scheme to entitle it to a certificate by the Registrar of Friendly Societies, but when the scheme has been certified, and its provisions substituted for those of the Act, the employer is to be liable only in accordance with the scheme. In the present case the certificate was given, and the county court judge has found that all the provisions of the Act with regard to it have been fulfilled. It would seem to follow as a logical result that, as the workman had exercised the option allowed him by the Act to take the rights given to him by the Act, he could not also pursue the rights that he would have had under the Employers' Liability Act.

It is said, however, that a workman who has joined a scheme has not made any election between a claim of compensation under the Act and proceedings under the Employers' Liability Act, because he is not pursuing any right under the provisions of the Workmen's Compensation Act out of which he has contracted himself. The answer to this is that the provisions of the scheme are substituted for the provisions of the Act; but they take effect under the Act by that substitution, and when he seeks to enforce them he does so under the Act. If he had proceeded under the provisions of the Act he would have been debarred from taking proceedings independently of the Act, and he is in the same position when proceeding under the provisions of a scheme which are substituted for the provisions of the Act.

The Divisional Court held that the benefits received under the

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Collins M.R.

scheme were not compensation received under the Workmen's Compensation Act; and that compensation had not been received by the plaintiffs under the Act because the provisions of the scheme were substituted for those of the Act. But it appears to me that the workman by his assent to the scheme, which assent is binding on his representatives, has placed them in the same position as if they were claiming compensation under the Act. In my opinion the judgment of the county court judge was right, and the appeal should be allowed.

ROMER L.J. I am of the same opinion. When under s. 3 of the Workmen's Compensation Act, 1897, there is a scheme certified by the Registrar of Friendly Societies, and also a contract in accordance with the provisions of the scheme between the workman and his employer, I think that the workman and those claiming through him are in the same position as if he or they had taken advantage of the provisions for compensation provided by the Workmen's Compensation Act. They cannot in view of the acceptance of the scheme take advantage of rights they would otherwise have had under the common law or the Employers' Liability Act. We have the findings of the county court judge that the various conditions imposed by the Act in respect of such a scheme were complied with, and that the deceased accepted the scheme in substitution for the benefits that he might claim under the Act. He would, therefore, have been debarred from making any claim otherwise than under the scheme, and the result is that his representatives cannot recover in such an action as this.

MATHEW L.J. I am of the same opinion. Sect. 3 of the Act points out the only way in which a workman can contract that the provisions of the Act shall not apply to him. It contains provisions insuring that the contract shall be fair and equitable, and for that purpose requires that the scheme shall be inquired into and certified by a public officer. The deceased became party to a scheme which has been found by the county court judge to have complied with the provisions of the Act and to have been thoroughly understood by the workman.

Under these circumstances I am of opinion that he exercised the option given him by s. 1, sub-s. 2 (*b*), of the Act, and was bound thereby, and that his representatives are bound by his doing so.

As to the case of *Beckley* v. *Scott & Co.* (1), I only wish to add that I am impressed by the reasoning of Holmes L.J., who dissented from the judgment of the majority of the Court.

I agree that the appeal must be allowed.

Appeal allowed.

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Mathew L.J.

Solicitors for plaintiffs: *A. H. Arnould & Son, for Stanbury Eardley, Birmingham.*

Solicitors for defendants: *Timbrell & Deighton, for W. Shakespeare & Co., Birmingham.*

A. M.

BEARDSLEY, APPELLANT *v.* GIDDINGS, RESPONDENT.

1904 *March* 3.

Adulteration—Food and Drugs—Institution of Prosecution—Sale of Food and Drugs Act, 1899 (62 & 63 *Vict. c.* 51), *s.* 19, *sub-s.* 1.

By s. 19, sub-s. 1, of the Sale of Food and Drugs Act, 1899, a prosecution under the Sale of Food and Drugs Acts "shall not be instituted" after the expiration of twenty-eight days from the time of purchase:—

Held, that the laying of the information, and not the service of the summons, was the institution of the prosecution.

CASE stated by justices.

On July 18, 1903, an information was laid by the appellant, who is an inspector under the Sale of Food and Drugs Acts for the county of Wilts, against the respondent, who is a farmer at Urchfont, in that county, carrying on the business of a milk seller. The information charged the respondent that on June 23, 1903, he unlawfully sold to the appellant milk which was not of the nature, substance, and quality of the article demanded by the appellant, being deficient in milk fat to the extent of 15 per cent.

The summons on this information was issued the same day,

(1) 2 I. R. 504.

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and was left by the appellant with the police on the same day for service on the respondent, but it was not served upon the respondent until July 22, 1903. The summons was returnable on August 18, and on that day the preliminary objection was taken that the proceedings had not been instituted within the time specified by s. 19, sub-s. 1, of the Sale of Foods and Drugs Act, 1899. (1) The respondent contended that as the summons was not served on the respondent until after the expiration of more than twenty-eight days from the time of the purchase, and the service of the summons was the institution of the prosecution, the summons must be dismissed. The appellant contended that the laying of the information was the institution of the prosecution, and that as that had been done within the twenty-eight days the prosecution was instituted within the due time.

The justices upheld the respondent's contention and dismissed the summons, but stated this case for the opinion of the Court.

J. R. Randolph, for the appellant. The justices were wrong. The institution of a prosecution is the laying of the information: *Thorpe* v. *Priestnall*. (2) There is no case in which the service of the summons is taken as the date of the institution of a prosecution. The prosecution must be instituted by the prosecutor, and he does this by laying the information. The service of the summons is not his business, but is done by the police.

J. A. Simon, for the respondent. The summons was out of time, for the service of the summons under the Food and Drugs Acts is the institution of the prosecution. In *Thorpe* v. *Priestnall* (2) there was no question of time, and that case did not arise under the Food and Drugs Acts. By s. 10 of the Act

(1) By s. 19, sub-s. 1, of the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), "When any article of food or drug has been purchased from any person for test purposes, any prosecution under the Sale of Food and Drugs Acts in respect of the sale thereof, notwithstanding anything contained in s. 20 of the Sale of Food and Drugs Act, 1875, shall not be instituted after the expiration of twenty-eight days from the time of the purchase."

(2) [1897] 1 Q. B. 159.

of 1879, which is replaced by the section now under consideration, the summons was to be served within a reasonable time, and, if the article was perishable, within twenty-eight days. The Legislature, therefore, in altering the section must have intended to make the service of the summons, and not the laying of the information, the institution of the prosecution. No doubt as a general rule a prosecution commences with the laying of the information, and that is, therefore, to be taken as the institution of the proceedings. But in a case like this it is the fact of the proceedings being brought to the notice of the vendor of the article that is important. The scheme of the Sale of Food and Drugs Acts is that the purchaser should divide the food or drug that he has purchased and should return one portion to the vendor, retaining one portion himself, and sending a third portion to be analyzed. Until the summons is served the vendor would be unaware that proceedings had been commenced against him, and if that service is unduly delayed, and the article is perishable, it would be too late for him to send his portion to his own analyst. It is plain, therefore, from the scheme of the Acts that the service of the summons, and not the laying of the information, is to be regarded as the institution of the proceedings.

[LORD ALVERSTONE C.J. But if so, could not the purchaser defeat the Act by keeping out of the way, and so preventing the summons from being served within the twenty-eight days?]

Personal service is not necessary. In certain cases the service of a citation has been held to be the institution of the proceedings: *Ditcher* v. *Denison*. (1) The question is discussed in *Yates* v. *Reg.* (2), and Cotton L.J. points out that the authorities do not support the proposition that proceedings before a magistrate commence when the information is laid. (3)

J. R. Randolph replied.

LORD ALVERSTONE C.J. In spite of the very able argument which we have heard for putting a limited construction on s. 19 of the Sale of Food and Drugs Act, 1899, I do not think

(1) (1857) 11 Moo. P. C. 324. (2) (1885) 14 Q. B. D. 648.
(3) 14 Q. B. D. at p. 661.

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Lord Alverstone C.J.

that we can accede to it. It is said that the previous section (s. 10 of the Act of 1879), which required that the summons to appear should be served within a reasonable time, and which has been replaced by the section now under consideration, ought to be looked at in order to see what was the intention of the Legislature in passing this section, and that as it referred explicitly to the service of the summons the present section when it speaks of a prosecution being instituted must mean that the service of the summons is the institution of the prosecution. That, however, is a dangerous argument, and one that cuts both ways, and it may be pointed out that the Legislature, having the previous section before them, may have preferred to alter the time to which the period of limitation is to run, from the service of the summons to the laying of the information. We have to construe the general words, "any prosecution . . . . shall not be instituted after the expiration of twenty-eight days from the time of the purchase." It seems to me that the laying of the information and the issue of the summons upon that information were well known to be the commencement of a prosecution, and where the words used are "prosecution shall not be instituted," I think it would require a stronger case to enable us to hold that that did not mean the laying of the information.

I quite agree that very possibly an objection which I suggested as to the service of the summons being regarded as the institution of the prosecution, namely, that the defendant might defeat the Act, is of no weight because of the provision for substituted service, but I think it would be unsafe to say that because it is important that proceedings in these cases should be taken promptly, the institution of the prosecution is not the laying of the information but the service of the summons. I think, therefore, that this appeal must be allowed. If the service of the summons was meant to be the test as to whether the twenty-eight days had run or not, there should have been express provision to that effect.

WILLS J. I am of the same opinion. It seems to me impossible to say from the language of s. 19 of the Sale of

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Food and Drugs Act, 1899, whether it was intended to continue the old policy or not, and that being so we can only put the natural construction on the words of the section, which are quite plain. The institution of a prosecution seems to me to mean ordinarily the commencement of the proceedings by which a person is brought before the Court, and I do not think that there are any words in the section sufficient to shew a contrary intention. It seems to me that *Ditcher* v. *Denison* (1) is the nearest case to the contrary; but I do not think that it has any general application. That case depended on its particular circumstances and the peculiarity of the proceedings in the Ecclesiastical Court.

KENNEDY J. I agree. I see nothing which would justify us in treating the words of this section differently from the sense which has been given to them more than once before. The institution of a prosecution has certainly been taken as regards criminal law to mean the commencement of the proceedings, and not the service of the summons. In the cases on the Criminal Law Amendment Act, 1885, it has been clearly laid down that it is sufficient if the information be laid within the specified time, and that that, therefore, is the institution of the prosecution.

Appeal allowed.

Solicitors for appellant: *R. B. Wheatley, Son & Daniel, for Cruttwell, Daniel & Cruttwells, Frome.*

Solicitor for respondent: *T. T. Rossiter, for E. B. Titley, Bath.*

(1) 11 Moo. P. C. 324.

A. P. P. K.

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Held, that the laying of the information, and not the service of the summons, was the institution of the prosecution. BEARDSLEY *v.* GIDDINGS Div. Ct. 847

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An award had been made against the appellants, who were foreigners resident out of the jurisdiction, in an arbitration alleged to have been held in pursuance of a provision contained in an agreement between the appellants and the respondent to the effect that, in the event of any dispute arising under the agreement, the same should be submitted to arbitrators to be appointed,

ARBITRATION—*continued.*
to which arbitration, however, the appellants had refused to be parties:—

Held, that there was no jurisdiction to allow service on the appellants out of the jurisdiction of a summons for leave to enforce the award under the Arbitration Act, 1889, s. 12. RASCH & Co. *v.* WULFERT - - - - C. A. 118

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BANKRUPTCY—*Bankruptcy Notice—Address of Creditor—Power of Court of Bankruptcy to go behind Judgment—Irregularity in Form of Judgment—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*); *s.* 7, *sub-s.* 3—*Bankruptcy Rules*, 1886 *to* 1890, *Appendix*, *Form No.* 6—*Receiving Order.*

The Court of Bankruptcy has power, on the hearing of a bankruptcy petition founded on a judgment debt, to go behind the judgment and inquire into the consideration for the debt.

But the fact that the judgment may be irregular or wrong in form is not a sufficient reason for going behind the judgment and dismissing the petition. A judgment is conclusive in the Court of Bankruptcy unless the consideration can be questioned.

It is not sufficient for a creditor who issues a bankruptcy notice to give in the notice an address at which he can be heard of; the address must be one at which the debtor can pay him, or secure or compound for the debt. The address must be that of a place at which the creditor is to be found during the seven days limited by the notice, whether the address is of the creditor's residence or of his place of business.

If the address stated in the notice is such an one at the date of the service, the occasional absence of the creditor from the place, even for a whole day, will not render the notice inefficient, unless the absence is such as to deprive the debtor of a reasonable opportunity of paying or securing or compounding for the debt according to the terms of the notice.

Nor would it make any difference that the address was the temporary home of the creditor, who had no permanent home, or that his absence occurred on the last day of the seven.

But if the creditor, after the service of the notice, abandons his place of address, so that it ceases to be a place where at reasonable times he, or some authorized agent on his behalf, can be found to receive payment of the debt, or to deal with the question of security or composition, the bankruptcy notice will cease to be efficient.

In re Stogdon, [1895] 2 Q. B. 534, commented on.

On July 25, 1901, an action for libel was commenced against a defendant, who in the writ and the pleadings was described as "a married woman." At that time a decree nisi had been made for the dissolution of the defendant's marriage. On November 25, 1901, the decree was made absolute. On October 30, 1902, the libel action was tried, when a verdict was found for the plaintiff with 5000*l.* damages, and the judge directed judgment to be entered accordingly.

The defendant applied for a new trial, and in June, 1903, the Court of Appeal ordered a new trial, unless the plaintiff would consent to reduce the damages to 1500*l.* To this the plaintiff afterwards consented, and the judgment was on July 19 amended accordingly, but the date of October 30 was not altered. The judgment as drawn up was in the ordinary form of a judgment against an unmarried woman, instead of in the form of judgment against a married woman in respect of her separate estate, as settled by the Court of Appeal in *Scott* v. *Morley*, (1887) 20 Q. B. D. 120.

The 1500*l.* not having been paid, the plaintiff on July 28 served a bankruptcy notice on the defendant claiming payment of the 1500*l.*, with interest thereon from October 30, 1902. In the notice the creditor gave as her address an hotel in London where she was temporarily residing. She was in the habit of stopping at that hotel, but did not permanently retain a room there. On August 4, the last of the seven days limited for compliance with the notice, the creditor at 10.15 A.M. went away from the hotel, leaving no address behind her. She went to Newhaven and thence to France, where she remained till the end of September. The debtor did not comply with the bankruptcy notice, and on August 24 the creditor presented a bankruptcy petition against her founded on the judgment debt and the act of bankruptcy committed by non-compliance with the bankruptcy notice, and on this petition a receiving order was made.

It was objected by the debtor (1) that the judgment was in a wrong form as a judgment against a defendant who was described in it as "a married woman"; (2) that too large an amount for interest was claimed in the notice, inasmuch as the judgment for 1500*l.* did not

BANKRUPTCY—*continued.*

really come into existence until the amendment of the original judgment; (3) that the address of the creditor given in the notice was not such an address as is required by Form No. 6 in the Appendix to the Bankruptcy Rules, 1886 to 1890:—

Held, by the Court of Appeal, (1) that, inasmuch as at the date of the trial of the action the defendant was unmarried, and a judgment could have been obtained against her creating a personal debt, the objection to the judgment was one of form only, and the Court of Bankruptcy had no power to go behind the judgment.

(2) That the objection as to interest was concluded by the judgment.

(3) That the address given by the creditor in the bankruptcy notice was a sufficient compliance with Form No. 6, and that the creditor could not be taken to have abandoned her temporary address when she left the hotel. *In re* BEAUCHAMP. *Ex parte* BEAUCHAMP **C. A. 572**

2. —— *Misdemeanour—Falsifying Books—Conviction — Discharge — "Special Reasons"—Refusal of Discharge — Period of Probation—Practice—Registrar's Refusal to rehear Application for Discharge—Rehearing before Court of Appeal—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 11, *sub-ss.* 9, 10—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 8.

The conviction of a bankrupt for an offence against s. 11 of the Debtors Act, 1869, is not in itself an absolute bar to an application for discharge. Upon such an application the Court may, under the discretion given to it by s. 8, sub-s. 2, of the Bankruptcy Act, 1890, of granting or refusing a discharge, take into consideration, as "special reasons" for granting the application, any circumstances connected with the offence which may go in mitigation of it. But it does not follow, if the Court holds that the bankrupt ought to be discharged on the ground of mitigating circumstances, that he is therefore entitled to his immediate discharge, as a matter of right, without any prior period of probation.

Whether good conduct on the part of a bankrupt subsequent to the refusal of his application for discharge is in itself a "special reason" sufficient to support a renewal of his application, *quære*.

Upon an appeal by a bankrupt from the registrar's refusal to hear his application for discharge, the Court of Appeal will, in a proper case, itself hear the application instead of remitting it to the registrar. *In re* SOLOMONS - - **C. A. 106**

3. —— *Offences—Undischarged Bankrupt—Obtaining Credit—Limit of Punishment—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 31—*Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *ss.* 11, 13.

By the Bankruptcy Act, 1883, s. 31, "Where an undischarged bankrupt who has been adjudged bankrupt under this Act obtains credit to the extent of twenty pounds or upwards from any person, without informing such person that he is an undischarged bankrupt, he shall be guilty of a misdemeanour, and may be dealt with and punished as if he had been guilty of a misdemeanour under the Debtors Act, 1869, and the provisions of that Act shall apply to proceedings under this section."

BANKRUPTCY—*continued.*

Sect. 11 of the Debtors Act, 1869, declares certain offences committed by persons adjudged bankrupt to be misdemeanours punishable by a sentence not exceeding two years' imprisonment with or without hard labour. Sect. 13 declares that the offence of fraudulently obtaining credit and certain other offences shall be misdemeanours punishable with imprisonment not exceeding one year with or without hard labour:—

Held, that an offence under s. 31 of the Bankruptcy Act, 1883, was punishable with a maximum sentence of one year's imprisonment with or without hard labour. THE KING *v.* TURNER - - - - **C. C. R. 181**

4. —— *Post-nuptial Settlement—Power of Revocation with Consent of Trustees—Partial Revocation in order to pay Debts on condition of further Property being settled — Resettlement — Bankruptcy of Settlor—Voluntary Settlement—"Purchasers for Value"—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 47.

In 1899 A. by a post-nuptial deed settled property upon trust for himself for life and, after his death, upon trusts for his widow and children (if any), with an ultimate trust, in default of issue, for his next of kin. The deed contained a power of revocation with the consent of the trustees, which they had an absolute discretion to give or to withhold. In 1902 A. applied to the trustees to consent to a partial revocation of the settlement in order to raise 1600*l.* out of the settled funds to pay pressing liabilities; but they refused except upon the express condition that he brought into settlement his life interest under the deed of 1899, and also a reversionary interest to which he had since become entitled. A. agreed to this, and, in consideration of the consent and of the 1600*l.*, he, in December, 1902, by deed assigned to the trustees his life interest under the deed of 1899 and the reversionary interest upon trusts which gave them during his life an absolute discretion to apply the income for benefit of A. or of his wife or children, and, subject thereto, upon similar trusts for his wife and children and next of kin, as in the deed of 1899, with a like power of revocation. In September, 1903, A. was adjudicated bankrupt in respect of debts incurred in that year, and the trustees refused to consent to any revocation of the deed of December, 1902:—

Held, that the trustees were not "purchasers for value" within the meaning of s. 47 of the Bankruptcy Act, 1883; and that, therefore, the deed of December, 1902, was a voluntary settlement and void against A.'s trustee in bankruptcy to the extent necessary to pay the debts in the bankruptcy. *In re* PARRY. *Ex parte* SALAMAN - - - **Wright J. 129**

5. —— *Procedure—Judgment Debt—Agreement to pay Judgment Debt by Instalments—Arrears of Instalments—Act of Bankruptcy—Bankruptcy Notice for Overdue Instalments—Notice to pay "in accordance with the Terms of the Judgment"—Validity of Notice—Garnishee Order Nisi—Stay of Execution under Judgment—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).

BANKRUPTCY—*continued.*

Sect. 4, sub-s. 1, of the Bankruptcy Act, 1883, specifying acts of bankruptcy, must be strictly interpreted. Therefore, a bankruptcy notice which requires payment of a judgment debt "in accordance with the terms of the judgment" is not a good notice within sub-s. 1 (*g*) if founded, not on the judgment according to its terms, but on the judgment as modified by some collateral agreement.

A creditor and his debtor agreed in writing that the debt should stand at a certain sum and that the debtor should consent to a judgment against him for that sum, but that the amount should be payable by instalments. Judgment was accordingly signed for the whole sum, but without any reference to payment by instalments. The debtor failing to pay some of the instalments as they fell due, the creditor served him with a bankruptcy notice requiring payment, not of the whole judgment debt, the final instalment of which had not yet become due, but of the total amount of the instalments then in arrear, as being "the amount due on the judgment":—

Held, that the notice was bad in that it did not require payment of the debt "in accordance with the terms of the judgment" within the above sub-section.

Per Vaughan Williams L.J.: A bankruptcy notice issued for a smaller sum than the judgment debt by reason of credit being given for amounts already paid is a notice to pay "in accordance with the terms of the judgment."

Per Stirling L.J.: Non-compliance with a judgment is not an act of bankruptcy so long as the terms of the judgment are controlled by an outside agreement between the judgment debtor and creditor.

In re Feast, (1887) 4 Morr. 37, distinguished.

Per Curiam and Romer L.J.: A garnishee order nisi obtained by a judgment creditor attaching all debts due to the judgment debtor to answer the judgment does not operate as a stay of execution on the judgment so as to preclude the creditor from issuing a bankruptcy notice under s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883. *In re* H. B. - - C. A. 94

6. —— *Receiving Order — Adjudication — Debtor's own Petition—Committal Order, Evasion of—Abuse of Process of Court—Annulling Bankruptcy—Jurisdiction—Assets—Personal Earnings —Administration in Bankruptcy.*

A creditor obtained judgment against a debtor, a furniture dealer's salesman, whose sole income was derived from his salary or wages, payable weekly, and commission on his sales. He had two children dependent upon him. On the debtor failing to pay the judgment debt, the creditor obtained, on a judgment summons, an order for payment of the debt by instalments. The instalments having fallen into arrear, the creditor obtained a committal order for the amount of the arrears, under pressure of which order the debtor paid the money. The instalments having again fallen into arrear, the creditor obtained a second committal order, whereupon the debtor, finding himself unable to comply with it, presented a bankruptcy petition, which

BANKRUPTCY—*continued.*

was followed, upon his own application, by a receiving order and adjudication. The judgment creditor was his only creditor, and he had no assets beyond the personal earnings from his employment. The judgment creditor then applied for annulment of the bankruptcy proceedings on the ground that they were an abuse of the process of the Court; but the registrar refused the application. On appeal:—

Held, that the proceedings were not, in the circumstances, an abuse of the process of the Court, and in fact would not prejudice the judgment creditor, inasmuch as the personal earnings of the bankrupt, beyond what was necessary for the maintenance of himself and his family, could be applied, in the proceedings, towards payment of the judgment debt: *In re Roberts*, [1900] 1 Q. B. 122. The appeal was therefore dismissed with costs.

Semble, it was the intention of the Legislature, by the Bankruptcy Act, 1883, to enable a debtor, in a proper case, to relieve himself from the pressure of a committal order by obtaining an adjudication in bankruptcy against himself. *In re* HANCOCK - - - - C. A. 585

7. —— *Settlement, Marriage — Husband's Covenant to settle all his after-acquired Property —Trade Profits invested in Land—Husband's Act of Bankruptcy—Conveyance to Settlement Trustees—Title of Trustee in Bankruptcy—"Become Bankrupt"—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*H*); *s.* 43; *s.* 47, *sub-s.* 2; *s.* 49.

For the purposes of s. 47 of the Bankruptcy Act, 1883—which enacts (sub-s. 2) that any covenant made in consideration of marriage for the future settlement on or for the settlor's wife or children of any property wherein he had not at the date of his marriage any estate or interest, shall, on his "becoming bankrupt" before the property has been "actually transferred" pursuant to the covenant, be void against the trustee in the bankruptcy—the words "become bankrupt" must be construed in the light of s. 43 of the Act, and refer to the commencement of the bankruptcy, i.e., to the earliest date to which the title of the trustee relates back by virtue of s. 43.

In 1879 A. on his marriage covenanted to settle all his after-acquired property (except business assets) upon trusts for the benefit of his wife and children. By 1901 he had made large profits in his business, and laid out 17,000*l.* in purchasing and furnishing a freehold house, where he resided with his wife and children. In April, 1903, he was in financial difficulties, and on May 26 he committed an act of bankruptcy, and in July he was adjudicated bankrupt on another act of bankruptcy committed on June 29. Meanwhile he had, on June 10, by two deeds transferred the house and furniture to his settlement trustees in pursuance of a written notice served on him by them on May 23:—

Held, that A. must be deemed to have become bankrupt on May 26, and that, the house and furniture not having been "actually transferred" before that date, the deeds of June 10 were void

BANKRUPTCY—*continued.*
against the trustee in bankruptcy so far as necessary to pay the debts in the bankruptcy.
Ex parte Bolland, (1873) L. R. 17 Eq. 115, questioned.
Held, also, that s. 49 of the Act (protecting bonâ fide transactions without notice) did not apply to a transaction that was voidable under s. 47. *In re* Reis. *Ex parte* Clough
Wright J. 451

8. — *Settlement of Settlor's own Property—Limitation to Settlor for Life determinable on Bankruptcy—Validity.*
By a settlement made in 1893 the settlor assigned property to trustees on trust to pay to him the annual income until he was declared bankrupt; thereafter his rights were to cease, and the trustees were to have power to apply at their discretion the income or any part thereof for his personal maintenance and support, and were to apply the residue for the benefit of his children, if any, or to accumulate it and add it to the corpus, which was ultimately to go to his relatives. In 1900 the settlor was adjudicated bankrupt, and the trustee in bankruptcy applied to set aside the settlement, and it was set aside so far as was necessary to pay the bankrupt's debts provable in the bankruptcy. The trustees of the settlement by consent raised a sufficient sum to pay the bankrupt's debts in full and the costs, but the bankruptcy was not annulled. In 1902 the settlor was adjudicated bankrupt for the second time, and the trustee in that bankruptcy applied again to set aside the settlement, but was refused on the ground that at the time of making the settlement the bankrupt was in a position to pay his debts without the aid of the settled property. The trustee in bankruptcy then applied for a declaration that the bankrupt's life estate under the settlement vested in the trustee in bankruptcy. Throughout these transactions the bankrupt was unmarried.
Held, that the first bankruptcy had operated under the settlement as a forfeiture of the settlor's life estate, and that it did not, therefore, vest in the trustee of the second bankruptcy. *In re* Johnson Johnson. *Ex parte* Matthews and Wilkinson *v.* Johnson Johnson and Dibb
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BUILDING—*Deposit of Plan—Time limited for Commencement of Work—Inclusion of several Buildings — Commencement of some Buildings within Time limited—Building not commenced within Time limited—Right to proceed without fresh Notice and Deposit—Local Government—Harrogate Corporation Act*, 1893 (56 & 57 *Vict. c. ccix.*), *s.* 27.
The Harrogate Corporation Act, 1893, by s. 27 enacts that "The deposit with the corporation of any plan of any street or building shall be null and void if the execution of the work specified in such plan be not commenced . . . . as to plans deposited after the passing of this Act, within three years from the date of such deposit . . . . and fresh notice and deposits shall, unless the corporation otherwise determine, be requisite."
The defendant, after the passing of the Act, deposited a plan shewing thereon a number of separate buildings. He commenced some of the buildings within three years from the deposit, and after the three years he commenced another of the buildings. On a case stated to determine whether the defendant had a right to proceed with this building without a fresh notice and deposit:—
Held, affirming the judgment of Wright J., that the plan must be taken to be a plan not of one building but of a number of buildings, and that so far as it related to buildings not commenced within three years from the deposit thereof it was null and void, and, unless the corporation otherwise determined, a fresh notice and deposit were requisite. Harrogate Corporation *v.* Dickinson - - C. A. 468

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CARRIER—*Lighterman — Contract — Exemption from "Loss of Goods which can be covered by Insurance" — Negligence of Carrier's Servants—Liability of Carrier.*
Goods were loaded on a barge under a contract for carriage by which the barge owner was exempt from liability "for any loss of or damage to goods which can be covered by insurance." The barge was sunk owing to the negligence of the servants of the barge owner, and the goods were lost. In an action to recover damages for the loss of the goods:—
Held, that, the exemption being in general terms not expressly relating to negligence, the barge owner was not exempt from liability for

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loss or damage caused by the negligence of his servants.
Judgment of Walton J., [1903] 1 K. B. 750, affirmed. PRICE & Co. *v.* UNION LIGHTERAGE COMPANY - - - - C. A. 412

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Distinguished by C. A. SHARMAN *v.* HOLLIDAY & GREENWOOD, LD. [1904] 1 K. B. 235
—— *Dierken* v. *Philpot* - [1901] 2 K. B. 380
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—— *Elliott* v. *Crutchley* - [1903] 2 K. B. 476
Affirmed by C. A. [1904] 1 K. B. 565
—— *Feast, In re* - - (1887) 4 Morr. 37
Distinguished by C. A. *In re* H. B. [1904] 1 K. B. 94

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—— *Gough and Aspatria, Silloth and District Joint Water Board, In re*, [1903] 1 K. B. 574.
Affirmed by C. A. [1904] 1 K. B. 417
—— *Hall* v. *Snowden, Hubbard & Co.*, [1899] 2 Q. B. 136.
Impliedly overruled by *Raine* v. *Jobson & Co.*, [1901] A. C. 404: *See* BARRETT *v.* KEMP BROTHERS C. A. [1904] 1 K. B. 517
—— *Harman* v. *Ainslie* - [1903] 2 K. B. 241
Reversed by C. A. [1904] 1 K. B. 698
—— *Harris* v. *De Pinna*, (1885-6) 33 Ch. D. 238.
Dictum in, overruled by C. A. KILGOUR *v.* GADDES - - [1904] 1 K. B. 457
—— *Harse* v. *Pearl Life Assurance Co.*, [1903] 2 K. B. 92.
Reversed by C. A. [1904] 1 K. B. 558
—— *Kaufman* v. *Gerson* - [1903] 2 K. B. 114
Reversed by C. A. [1904] 1 K. B. 591
—— *King* v. *England* - (1864) 4 B. & S. 782
Dictum of Blackburn J. in, affirmed by C. A. MOORE, NETTLEFOLD & Co. *v.* SINGER MANUFACTURING CO. [1904] 1 K. B. 820
—— *Moore, Nettlefold & Co.* v. *Singer Manufacturing Co.*, [1903] 2 K. B. 168.
Affirmed by C. A. [1904] 1 K. B. 820
—— *Price & Co.* v. *Union Lighterage Co.*, [1903] 1 K. B. 750.
Affirmed by C. A. [1904] 1 K. B. 412
—— *Raine* v. *Jobson & Co.* - [1901] A. C. 404
Considered by C. A. BARRETT *v.* KEMP BROTHERS - - [1904] 1 K. B. 517
—— *Roberts, In re* - - [1900] 1 Q. B. 122
Referred to by C. A. *In re* HANCOCK [1904] 1 K. B. 585
—— *Scott* v. *Morley* (1887) 20 Q. B. D. 120.
See In re BEAUCHAMP C. A. [1904] 1 K. B. 572
—— *Shaw* v. *Port Philip Gold Mining Co.*, (1884) 13 Q. B. D. 103.
Followed by Kennedy J. RUBEN *v.* GREAT FINGALL CONSOLIDATED [1904] 1 K. B. 650
—— *Solicitor-General* v. *Law Reversionary Interest Society*, (1873) L. R. 8 Ex. 233.
Followed by C. A. ATTORNEY-GENERAL *v.* NORTHUMBERLAND (DUKE OF) [1904] 1 K. B. 762
—— *Stockdale* v. *Ascherberg* [1903] 1 K. B. 873
Affirmed by C. A. [1904] 1 K. B. 447
—— *Stogdon, In re* - - [1895] 2 Q. B. 534
Commented on by C. A. *In re* BEAUCHAMP - - [1904] 1 K. B. 572
—— *Stone & Co.* v. *Midland Ry. Co.*, [1903] 1 K. B. 741.
Affirmed by C. A. [1904] 1 K. B. 669
—— *Valpy* v. *St. Leonards Wharf Co.*, [1903] 1 L. G. R. 305.
Followed by Wright J. HARRIS *v.* HICKMAN - - [1904] 1 K. B. 13

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—— *Worthington* v. *Curtis* (1875) 1 Ch. D. 419 Followed by C. A. ATTORNEY-GENERAL *v.* MURRAY - [1904] 1 K. B. 165

CERTIFICATE — Share certificate issued by secretary — Forgery — Principal and agent—Scope of employment - 650
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CHARTERPARTY — Lump sum freight — Recovery of balance by charterer - 635
See SHIPPING. 2.

CHIMNEY — Black smoke — Private dwelling-house—Club - - - 208
See NUISANCE. 1.

—— Sending forth black smoke—Nuisance—Funnel of steam-tug - - 804
See LONDON. 5.

CLUB — Black smoke — Chimney of private dwelling-house - - - 208
See NUISANCE. 1.

COACHMAN — Negligence — Injury to article bailed—Liability of master—Bailment
See EMPLOYER AND WORKMAN. 1. 628

COMMITTAL ORDER—Evasion of — Receiving order — Adjudication — Debtor's own petition. - - - - 585
See BANKRUPTCY. 6.

COMPANY — *Share Certificate issued by Secretary—Forgery—Principal and Agent—Scope of Employment.*

The plaintiffs advanced in good faith a sum of money, which they had borrowed from their bankers, to the secretary of the defendant company for his own purposes on the security of a share certificate issued to them by the secretary, which, in accordance with the articles of association of the company, purported to be signed by two directors, to bear the company's seal, and to be countersigned by the secretary. As a matter of fact the signatures of the directors were forgeries, and the seal had been fraudulently affixed by the secretary to the certificate without any authority from the defendant company. In an action claiming that the defendant company should register the names of the plaintiffs' bankers in their books as owners of their shares:—

Held, on the authority of *Shaw* v. *Port Philip Gold Mining Co.*, (1884) 13 Q. B. D. 103, that the company were estopped by the certificate issued by their secretary from disputing the right of the plaintiffs to have the names of their bankers registered as the owners of the shares.
RUBEN *v.* GREAT FINGALL CONSOLIDATED
Kennedy J. 650

—— Debenture bond—Stamp duty — "Marketable security"—Given in substitution for a like security - - - 757
See REVENUE. 6.

—— Examination of officer of company—Officer who has retired — Execution — Judgment against company - - 794
See PRACTICE. 4.

—— Stamp duty — Consolidation of debenture stock—Issue of loan capital - 263
See REVENUE. 5.

COMPENSATION—Compulsory sale of land — Interest in land—Right to supply refreshments in a theatre - - 713
See LANDS CLAUSES ACTS. 1.

—— Injurious affection — Compensation—Right of assignee to sue in own name - 277
See LANDS CLAUSES ACTS. 2.

—— Negligence—Acceptance of scheme under Workmen's Compensation Act, 1897
See EMPLOYER AND WORKMAN. 2 838

—— Waterworks — Land compulsorily taken—Special adaptability - - 417
See WATER. 2.

—— Workmen's compensation.
See under EMPLOYER AND WORKMAN.

COMPULSORY POWERS — Notice to treat — Service—Railway company - 1
See LANDS CLAUSES ACTS. 3

CONDITION — Implied — Breach — Measure of damages - - - - 725
See SALE OF GOODS.

—— Precedent—Policy—Warranty not to commit suicide - - - - 832
See INSURANCE, LIFE. 2.

—— Precedent to claim for further compensation —Workmen's compensation - 339
See EMPLOYER AND WORKMAN. 16.

CONFLICT OF LAWS — *Contract obtained by Duress Abroad—Threat of Prosecution—Contract not illegal where made.*

An English Court will not enforce a foreign contract, though valid by the law of the country in which it was made, in cases where the Court deems the contract to be in contravention of some essential principle of justice or morality.

The plaintiff, who was domiciled in a foreign country, sued on a contract made in that country between himself and the defendant, a woman likewise domiciled there, whom he had coerced into signing the contract by threats of a criminal prosecution against her husband for an offence which he had committed, the consideration for the contract being that the plaintiff would not prosecute the husband. Evidence was given to the effect that the contract was not invalid by the law of the country in which it was made:—

Held, that, even assuming that to be so, the Court would not enforce a contract so procured.

Judgment of Wright J., [1903] 2 K. B. 114, reversed. KAUFMAN *v.* GERSON - C. A. 591

CONSIDERATION—Failure of—Contract, Impossibility of performance - 493, 565
See CONTRACT, 1, 2.

CONTRACT — *Impossibility of Performance — Money paid under Contract, whether Recoverable —Right accrued before Performance impossible—Failure of Consideration—Coronation Procession.*

The defendant agreed to let to the plaintiff a room for the purpose of viewing the coronation procession of June 26, 1902, for the sum of 141*l.* 15*s.* The procession subsequently became impossible, owing to the illness of the King. By the terms of the contract the price of the room was payable before the time at which the procession became impossible. The plaintiff had

CONTRACT—*continued.*
paid 100*l.* on account of the price of the room, and the balance remained unpaid:—
Held, that the plaintiff was not entitled to recover the 100*l.* which he had paid, and that the defendant was entitled to payment of the balance, inasmuch as his right to that payment had accrued before the procession became impossible. CHANDLER *v.* WEBSTER - **C. A. 493**

2. —— *Impossibility of Performance—Payment made "on account of" Contract—Express Provision in event of Performance becoming impossible—Coronation Procession.*
The plaintiff, a refreshment contractor, agreed with the defendants, who were acting on behalf of the Navy League, to supply refreshments on a steamer engaged for the purpose of taking members of the society to the naval review on the occasion of the King's coronation. By the terms of the contract a sum of 300*l.* was to be paid to the plaintiff "on account of the refreshments" on a day previous to the review day; and the contract contained a stipulation that, in the event of the cancellation of the review before any expense was incurred by the contractor, there should be no liability on the part of the defendants. The plaintiff expended a small sum on extra knives, forks, and crockery for the purposes of the contract, but nothing on refreshments. A cheque for 300*l.* was sent by the defendants to the plaintiff in accordance with the contract. On the next day, owing to the illness of the King, the review was countermanded. The cheque not having been presented by the plaintiff, payment of it was stopped by the defendants:—
Held, in an action on the cheque, affirming the decision of Ridley J., [1903] 2 K. B. 476, that the plaintiff was not entitled to recover, the true construction of the contract being that, in the event of the cancellation of the review, the defendants should only be liable to reimburse the plaintiff for any expense already incurred by him. ELLIOTT *v.* CRUTCHLEY - **C. A. 565**

—— Carriage — Conveyance of goods by passenger train—Collection and delivery
See RAILWAY. **669**

—— Compensation—Interest in land—Right to supply refreshments in a theatre **713**
See LANDS CLAUSES ACTS. 1.

—— Conflict of laws — Contract obtained by duress abroad—Threat of prosecution—Contract not illegal where made **591**
See CONFLICT OF LAWS.

—— Exemption from "loss of goods which can be covered by insurance" - - **412**
See CARRIER.

—— Insurance — Illegality — Policy on life of another—Recovery of premiums **558**
See INSURANCE, LIFE. 1.

—— Landlord and Tenant.
See under LANDLORD AND TENANT.

—— Married woman — Separate property—Restraint on anticipation — Judgment — Execution - - - **28, 35**
See HUSBAND AND WIFE. 2, 3.

CONTRACT—*continued.*
—— Request to another to acquire interest—Promise to pay amount expended **124**
See FRAUDS, STATUTE OF.

CONVEYANCING AND LAW OF PROPERTY—Lease—Forfeiture for non-payment of rent—Underlessee—Relief - **601**
See LANDLORD AND TENANT. 1.

COPYHOLD—*Arbitrary Fine — Custom to take smaller Fine on Admittance from Tenant of Manor than from Stranger — Colourable Purchase — Amount of reasonable Fine.*
By the custom of a manor the purchaser of a copyhold tenement was required to pay to the lord on admittance a substantial arbitrary fine if he was a stranger to the manor, but only a nominal fine if he was already a tenant of the manor. A stranger, who was about to buy a copyhold tenement of considerable value, with the object of first becoming a tenant of the manor and thereby avoiding the payment of the larger fine, entered into an agreement with a third person for the sale to him of a cottage of small value in the manor on the terms that the vendor should after the expiration of three months repurchase it, and in the interval should receive the rent of it for his own use, and should pay all outgoings in connection with it. In pursuance of that agreement the cottage was surrendered, and the purchaser was admitted tenant, he paying a comparatively small arbitrary fine in respect of that admittance. The terms of the agreement were not disclosed to the lord. Subsequently the purchaser was admitted tenant of the larger tenement, and, as being already a tenant of the manor, was charged in respect of it only a nominal fine:—
Held, that the stipulation in the agreement for the sale of the cottage that the vendor should retain the rent and remain liable for the outgoings shewed that the purchase was merely colourable; that the admittance of the purchaser was consequently void; and that the lord was entitled to claim a substantial fine upon the admittance to the larger tenement.
Semble, that the stipulation that the vendor should repurchase after a short interval was not enough to render the purchase merely colourable.
In manors in which such a custom as that above stated obtains the arbitrary fine which the lord is entitled to take from a stranger is not limited, in accordance with the general rule, to two years' improved value of the tenement; something more may be added on account of the fact that admittance will entitle the purchaser to be admitted to future purchases at a nominal fine; and for the purpose of determining how much it is reasonable to add on that account regard must be had to the value of the property, and to the consequent probability that it has been bought with the express object of getting the benefit of the custom on the future admittance to some other property which it is then intended to buy. ATTORNEY-GENERAL *v.* SANDOVER
Channell J. **689**

CORONATION PROCESSION—Contract—Impossibility of performance - **493, 565**
See CONTRACT. 1, 2.

CORPORATION—*Election—Nomination and Election of Disqualified Person—Right of Opponent to claim Seat—Notice of Disqualification—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 56, *sub-s.* 2.

The petitioner and respondent were nominated in proper form for election to the office of councillor for a ward in a borough, and the respondent obtained the majority of votes and was declared elected. But at the time of his nomination and of the election, however, he was disqualified by reason of his interest in a contract with the council. The petitioner claimed the seat on the ground that his being the only valid nomination he should be declared elected. The respondent admitted the disqualification:—

Held, that, the disqualification not being apparent on the face of the nomination paper, the nomination of the respondent was valid, and that as the petitioner did not allege any notice to the electorate of the disqualification of the respondent, the votes given for him could not be treated as having been thrown away, and the petitioner was not entitled to claim the seat. HOBBS *v.* MOREY - - - **Div. Ct. 74**

—— Buildings.
See under BUILDING.

COSTS—"Costs of execution"—High bailiff—Possession money - - - **68**
See COUNTY COURT. 2.

—— County courts—Payment into court—Judgment for defendant - - **535**
See COUNTY COURT. 1.

—— Distress—Poor-rate—Reasonable costs of selling distress - - - **811**
See DISTRESS. 1.

—— Licensing justices—Jurisdiction—Licensing appeals - - - - **545**
See LICENSING ACTS. 1.

—— Locomotives Act—Action in High Court—Costs on High Court scale - **62**
See HIGHWAY. 2.

—— Reference of action to master—Discretion to give costs on High Court scale
See PRACTICE. 2. **145**

—— Solicitor's lien for costs—Cross-judgments—Execution - - - - **399**
See COUNTY COURT. 3.

—— Workmen's compensation—Appeal—Refusal to direct review of taxation of costs - - - - **358**
See EMPLOYER AND WORKMAN. 15.

COUNTY COURT—*Costs—Action sent for Trial in County Court—Order* XIV.*—Payment into Court of Part of Claim as Condition of Leave to Defend—Judgment for Defendant in County Court—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 65, 107, 113—*County Court Rules, Order* IX., *r.* 12; *Order* LIII., *r.* 18.

An action founded on contract having been brought in the High Court for 71*l.*, the plaintiffs took out a summons for judgment under Order XIV., and an order was made giving the defendants leave to defend on paying 23*l.* into court within seven days, otherwise final judgment for that sum, with liberty to defend as to the residue of the plaintiffs' claim. The defendants

COUNTY COURT—*continued.*

paid the 23*l.* into court within the seven days; and, the action having been sent for trial in the county court under s. 65 of the County Courts Act, 1888, the defendants gave notice to the plaintiffs, more than five clear days before the day appointed for the hearing, that they consented to judgment for the 23*l.* At the hearing the county court judge gave judgment for the defendants as to the residue of the claim, with costs from the date of their notice consenting to judgment for 23*l.*:—

Held, that the defendants were entitled to costs from the date of their notice consenting to judgment, and that those costs ought to be taxed according to Scale C of the county court scales of costs, being the scale applicable "where the subject-matter or sum recovered exceeds 50*l.*" ASTON TUBE WORKS, LIMITED *v.* DUMBELL **Div. Ct. 535**

2. —— "*Costs of Execution*"—*Practice—High Bailiff—Possession Money—Several Warrants against same Debtor—Different Goods seized on same Premises under each Warrant—Same Man in Possession under all the Warrants—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 146, 154—*Treasury Order, February* 22, 1901, *r.* 35—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 11.

When the high bailiff of a county court levies execution on the goods of a judgment debtor under several warrants, and seizes the same goods to satisfy the warrants, he is only entitled to charge one possession fee. But if he seizes and appropriates different goods to satisfy each warrant, he is entitled to possession money under each warrant, although all the goods seized under the several warrants are on the same premises and possession under all the warrants is held simultaneously by one person only. *In re* MORGAN. *Ex parte* THE BOARD OF TRADE **Wright J. 68**

3. —— *Cross-judgments—Execution—Payment of Judgment Debt into Court—Solicitor's Lien for Costs—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 150.

By s. 150 of the County Courts Act, 1888, "if there shall be cross-judgments between the parties, execution shall be taken out by that party only who shall have obtained judgment for the larger sum, and for so much only as shall remain after deducting the smaller sum, and satisfaction for the remainder shall be entered, as well as satisfaction on the judgment for the smaller sum; and if both sums shall be equal, satisfaction shall be entered upon both judgments:—

Held, that this section applied where there were cross-judgments in separate actions, and not merely where there were cross-judgments upon claim and counter-claim in the same action; also that it applied where the party against whom judgment had been obtained for the larger sum had paid that sum into court so that no execution was taken out; also that the party against whom judgment had been obtained for the larger sum was entitled to have deducted from the sum paid into court the smaller sum for which he had obtained judgment, and that the balance only between the larger and smaller sums should be paid out to the party who had

COUNTY COURT—*continued.*
obtained judgment for the larger sum, notwithstanding that the solicitor for the party who had obtained judgment for the larger sum claimed a lien for his costs which exceeded in amount the sum paid into court. WARD *v.* HADDRILL
Div. Ct. 399

4. —— *Jurisdiction—Sale of Equity of Redemption—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 67.
Sect. 67 of the County Courts Act, 1888, gives the county court jurisdiction in actions for specific performance of any agreement for the purchase of any property where the purchase-money shall not exceed the sum of 500*l.* In an action in the county court for specific performance of an agreement to purchase for 75*l.* some leasehold property which was of the value of more than 500*l.*, but was subject to a heavy charge:—
Held, that the action was within the jurisdiction of the county court, since the test was the actual purchase-money to be paid, and not the value of the property subject to the charge. THE KING *v.* JUDGE WHITEHORNE - Div. Ct. 827

5. —— *Practice—Remittal of Action to County Court—Claim originally exceeding* 100*l.—Reduction by Amendment of Writ—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 65.
Where in an action of contract the claim indorsed on the writ originally exceeded 100*l.*, but the plaintiff obtained leave for an amendment of the writ, by which the claim was reduced to 24*l.*:—
Held, that there was jurisdiction under the County Courts Act, 1888, s. 65, to order the action to be remitted to the county court.
Dierken v. *Philpot*, [1901] 2 K. B. 380, considered. SNEADE *v.* WOTHERTON BARYTES AND LEAD MINING COMPANY - - C. A. 295

—— Appeal from county court—Right to appeal on leave to Court of Appeal - 820
See DISTRESS. 2.

—— Costs—Reference of action to master—Discretion to give costs on High Court scale - - - - - 145
See PRACTICE. 2.

—— Discretion of county court judge—Workmen's compensation - - 218
See EMPLOYER AND WORKMAN. 7.

COUNTY COURT RULES, Order IX., r. 12; Order LIII., r. 18 - - - - 535
See COUNTY COURT. 1.

COVENANT—Assignment of reversion—Liability of assignor on express covenants in lease - - - - - 362
See LEASE.

—— Not to assign or sublet—Covenant to be "performed"—Proviso for re-entry.
See LANDLORD AND TENANT. 5. - 698

—— Not to carry on a business—Reasonableness of restriction — Question, whether for judge or jury - - - 45
See RESTRAINT OF TRADE.

—— Outgoings, Covenant by tenant to pay—Yearly tenancy—Defective drain 13
See LANDLORD AND TENANT. 4.

COVENANT—*continued.*
—— To settle after-acquired property — Trade profits invested in land—"Become bankrupt" - - - - 451
See BANKRUPTCY. 7.

CREDITOR—Bankruptcy.
See under BANKRUPTCY.

CRIMINAL LAW—*Evidence—Nature and Conduct of Defence—Evidence of Person Charged—Cross-examination as to Character—Criminal Evidence Act*, 1898 (61 & 62 *Vict. c.* 36), *s.* 1, *sub-s.* (*f*), (*ii.*).
Upon the trial of an indictment for conspiring by false pretences to induce the prosecutor to sell a mare, the prosecutor gave evidence that one of the defendants had previously offered to buy the mare on credit. The defendant in question was called as a witness for the defence, and was asked in cross-examination, "Did you ask the prosecutor to sell you the mare in April, or has he invented all that?" To which he replied, "No, it is a lie, and he is a liar." Counsel for the prosecution was thereupon allowed to cross-examine the defendant as to previous convictions:—
Held, that the defendant's answer amounted only to an emphatic denial of the truth of the charge against him; that the nature or conduct of the defence was not such as to involve imputations on the character of the prosecutor within the meaning of s. 1, sub-s. (*f*), (ii.), of the Criminal Evidence Act, 1898, and that therefore the defendant was not liable to be cross-examined as to his previous character. THE KING *v.* ROUSE
C. C. R. 184

2. —— *False Pretences—Fraud—Evidence of previous Acts of Fraud—Admissibility.*
Upon an indictment for obtaining credit by means of fraud, it was proved that the defendant hired furnished apartments from the prosecutrix and occupied them for three days, when he left without paying for them or for the food supplied to him. Evidence was admitted that a short time previously to the particular transaction the defendant had gone to several houses and hired apartments and left without paying, and that he still owed the money when he went to the house of the prosecutrix:—
Held, that the evidence, being evidence of similar acts committed by the defendant at a period immediately preceding the commission of the alleged offence, was admissible as tending to establish a systematic course of conduct, and as negativing any accident or mistake or the existence of any reasonable or honest motive on his part. THE KING *v.* WYATT - C. C. R. 188

CROSS-EXAMINATION—As to character—Evidence of person charged - - 184
See CRIMINAL LAW. 1.

CROSS-JUDGMENTS — Execution — Payment of judgment debt into court — Solicitor's lien for costs - - - 399
See COUNTY COURT. 3.

DAMAGE — Remoteness of — Slander — Special damage - - - - 138
See DEFAMATION.

DAMAGES—Sale of goods—Implied condition—Breach—Measure of damages - 725
See SALE OF GOODS.

"DAYS"—How to be reckoned—Voyage policy
See INSURANCE, MARINE. 3. 40

DEBENTURE — Consolidation — Stamp duty — Issue of loan capital - - 263
See REVENUE. 5.

—— Stamp duty — "Marketable security" — Debenture bond—"Given in substitution for a like security" - - 757
See REVENUE. 6.

DEBT—*Assignment of Debt—Advance of Money to Vendor of Goods—Direction to pay Price to Lender—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6.

The plaintiffs, who were as bankers financing a firm, which imported india-rubber, had accepted bills drawn by the sellers abroad for the price of india-rubber bought by the firm, and afterwards resold by them to the defendants. When the india-rubber was delivered to the defendants, the firm sent to the plaintiffs a document consisting of two parts, which were detachable from one another, and were in substance as follows. The first part was a letter signed by the firm, and addressed to the defendants, requesting them to sign and forward to the plaintiffs the attached letter, which formed the other part of the document. That letter was addressed to the plaintiffs, and stated that the undersigned begged to confirm that they would remit the price of the india-rubber due from them to the firm direct to the plaintiffs for account of the firm. The plaintiffs forwarded this document to the works belonging to the defendants, where the letter attached was signed by the defendants' manager, who returned it to the plaintiffs. The manager had no authority from the defendants to sign such a document. He omitted to advise the defendants of the fact that he had signed the letter, and they subsequently paid the price of the india-rubber to the firm, who afterwards became bankrupt. In an action brought by the plaintiffs against the defendants for the price of the india-rubber:—

Held, reversing the judgment of Walton J., that the document above mentioned did not constitute an assignment of the debt due from the defendants to the firm, either legal or equitable, and therefore the plaintiffs could not maintain the action. BRANDTS, SONS & Co. *v.* DUNLOP RUBBER COMPANY - - - C. A. 387

—— Payment of judgment debt into court — Cross-judgments — Execution — Solicitor's lien for costs - - - 399
See COUNTY COURT. 3.

DEBTORS ACT—Bankrupt—Discharge, Refusal of—Rehearing before Court of Appeal
See BANKRUPTCY. 2. 106

—— Offences—Undischarged bankrupt—Obtaining credit—Limit of punishment 181
See BANKRUPTCY. 3.

DEFAMATION — *Slander — Special Damage — Remoteness of Damage.*

Where an action of slander was brought in respect of a statement made by the defendant to the plaintiff's employers that the plaintiff had removed from premises, leaving rent due to his landlord, the plaintiff alleging that he had in consequence of that statement been dismissed from the service of his employers:—

Held, that the action would not lie, the damage alleged being too remote. SPEAKE *v.* HUGHES - - - - - C. A. 138

DISCHARGE—Refusal—Bankrupt — Rehearing before Court of Appeal - - 106
See BANKRUPTCY. 2.

DISCOVERY — Ship's papers — Underwriters. Action by—Recovery of money overpaid—Right of plaintiffs to full discovery
See PRACTICE. 784

DISCRETION—County court judge—Workmen's compensation - - - 218
See EMPLOYER AND WORKMAN. 7.

DISEASE— Workmen's compensation — Disease communicated by material worked on
See EMPLOYER AND WORKMAN. 6. 328

DISQUALIFICATION — Notice of — Election — Right of opponent to claim seat - 74
See CORPORATION.

DISTRESS—*Poor-rate—Reasonable Costs of selling Distress—Distress (Costs) Act*, 1817 (57 *Geo.* 3, *c.* 93), *s.* 1, *Schedule—Distress (Costs) Act*, 1827 (7 & 8 *Geo.* 4, *c.* 17)—*Distress for Rates Act*, 1849 (12 & 13 *Vict. c.* 14), *s.* 1.

The schedule to 57 Geo. 3, c. 93, as applied by 7 & 8 Geo. 4, c. 17, to distress for poor-rate, in so far as it prescribes a maximum limit in respect of the costs of sale of the distress, is impliedly repealed by 12 & 13 Vict. c. 14, s. 1, which gives the justices power to order that the levy shall include "the reasonable charges of taking, keeping, and selling of the said distress." HILL *v.* PANNIFER - - - Div. Ct. 811

2. —— *Sale by Auction of Goods distrained—Purchase by Landlord—Landlord and Tenant—2 Will. & M. Sess.* 1, *c.* 5, *s.* 2—*Practice—Appeal from County Court—Leave to appeal to High Court — Right to appeal on leave to Court of Appeal — Supreme Court of Judicature (Procedure) Act*, 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-s.* 5.

A sale, in pursuance of 2 Will. & M. Sess. 1, c. 5, s. 2, of goods distrained must be a sale to a third party, and if the landlord purchase the goods himself no property passes.

Judgment of the Divisional Court, [1903] 2 K. B. 168, and dictum of Blackburn J. in *King* v. *England*, (1864) 4 B. & S. 782, affirmed.

In an action in the county court, where the leave of the judge to appeal to the High Court is required, the giving of leave creates a right of appeal within s. 1, sub-s. 5, of the Supreme Court of Judicature (Procedure) Act, 1894, and a further appeal lies to the Court of Appeal by leave of the Divisional Court hearing the appeal or of the Court of Appeal. MOORE, NETTLEFOLD & Co. *v.* SINGER MANUFACTURING COMPANY C. A. 820

DISTRESS—*continued.*

—— Rates, Recovery of — Illegal distress — Liability of overseers for act of assistant overseer - - - - 743
See RATES. 1.

DIVIDED PARISHES AND POOR LAW.
See under POOR LAW.

DOCK—Employment on a ship in—Workmen's compensation—Seaman - - 510
See EMPLOYER AND WORKMAN. 11.

DRAINS.
See under SEWERS.

DURESS—Contract obtained by, abroad—Threat of prosecution — Contract not illegal where made - - - - 591
See CONFLICT OF LAWS.

DUTY—Public revenue.
See under REVENUE.

EASEMENT — Prescription — Enjoyment as between tenants—Unity of ownership
See WAY, RIGHT OF. 457

ELECTION—Disqualification, Notice of—Right of opponent to claim seat - - 74
See CORPORATION.

EMPLOYER AND WORKMAN — *Coachman — Negligence of Servant — Bailment — Bailor and Bailee—Injury to Article bailed — Liability of Master.*

The defendant sent his carriage to be repaired by the plaintiff, who was a coach-builder. The plaintiff lent a carriage of his own to the defendant for use while the repairs were going on. The coachman of the defendant, without his knowledge, took the plaintiff's carriage out for his own purposes, and while he was driving the carriage it was injured through his negligence. In an action to recover the cost of repairing it:—

Held, that as the coachman at the time when the injury was done to the carriage was not acting in the course of his employment, the defendant was not liable.

Coupé Co. v. *Maddick*, [1891] 2 Q. B. 413, considered. SANDERSON *v.* COLLINS - **C. A. 628**

2. —— *Compensation—Acceptance of Scheme under Workmen's Compensation Act*, 1897—*Effect on Right to sue independently of Act—Negligence—Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42) — *Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-s.* 2 (*b*); *s.* 3, *sub-s.* 1.

A workman who had joined a scheme duly certified by the Registrar of Friendly Societies under s. 3, sub-s. 1, of the Workmen's Compensation Act, 1897, received fatal injuries, alleged to have been caused by the personal negligence of his employers, or of some person for whose act or default his employers were responsible. After the workman's death his legal personal representatives brought an action to recover damages under the Employers' Liability Act, 1880:—

Held, reversing the judgment of the Divisional Court, that the contract by the workman that the provisions of the scheme should be substituted for the provisions of the Act was an exercise of the option given to him by s. 1, sub-s. 2 (*b*), of the Act to claim compensation under the Act, and was a bar to the claim to the recovery by representatives of damages under the Employers' Liability Act, 1880. TAYLOR *v.* HAMSTEAD COLLIERY COMPANY - - - **C. A. 838**

3. —— *Compensation—Accident arising out of and in the course of the Employment—Workman going to work — Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-s.* 1.

An engine driver in the employ of a railway company had, in order to commence his day's work, to go in the morning to the company's engine shed. His proper route to the engine shed was through a gate opening from the public road on to the railway, and thence by a pathway which did not cross the rails. One morning, on getting through the gate, instead of going along the pathway towards the engine shed, he went in the opposite direction along the railway to a signal-box, which stood in the middle of the line with rails on both sides of it, in order to get some information from the signalman for his own purposes. After obtaining the information which he required, he proceeded from the signal-box towards the engine shed along the railway. Some time afterwards he was found lying on the line seriously injured, having presumably been run down by an engine, and he subsequently died of his injuries. On a claim for compensation by his dependants against the company under the Workmen's Compensation Act, 1897:—

Held, that the accident could not be said to have arisen out of and in the course of the deceased man's employment, and therefore the claim for compensation must fail. BENSON *v.* LANCASHIRE AND YORKSHIRE RAILWAY COMPANY. **C. A. 242**

4. —— *Compensation—Agreement—Registration of Memorandum — Genuineness—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Sched. II., s.* 8.

Sched. II., s. 8, of the Workmen's Compensation Act, 1897, provides that where the amount of compensation under the Act shall have been ascertained by agreement, a memorandum thereof shall be sent by any party interested to the registrar of the county court, who, "on being satisfied as to its genuineness," shall record it in a special register:—

Held, that the registrar could not refuse to record the memorandum merely because owing to altered circumstances the workman was no longer entitled to the amount of compensation fixed by the agreement, but that his only duty was to ascertain whether the memorandum accurately represented the agreement which had been entered into. BLAKE *v.* MIDLAND RAILWAY COMPANY - - - - **Div. Ct. 503**

5. —— *Compensation—Break in Employment—Accident during Dinner Hour—Workmen permitted to remain on Premises—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1.

A workman was paid by the hour for the number of hours per week that he was actually engaged on his work, not including the mid-day

dinner hour. During that hour he was at liberty to stay and take his meal on the premises, or to go elsewhere. He stayed on the premises, and sat down to eat his dinner, and while so doing a wall fell upon him, and he was injured. On appeal from the refusal of an application for an award of compensation under the workmen's Compensation Act, 1897 :—

Held, that during the dinner-hour there had been no break in the employment of the workman, and that he was entitled to claim compensation. BLOVELT *v.* SAWYER - - C. A. 271

6. —— *Compensation—Disease communicated by Material worked on—Accident arising out of and in the course of Employment — Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1.

A workman employed in a wool-combing factory, in which there was wool which had been taken from sheep infected with anthrax, contracted that disease by contact with the anthrax bacillus which was present in the wool. On an application for compensation under the Workmen's Compensation Act, 1897 :—

Held, that the workman was injured by accident arising out of and in the course of his employment within the meaning of s. 1 of the Act. HIGGINS *v.* CAMPBELL & HARRISON, LIMITED. TURVEY *v.* BRINTONS, LIMITED - C. A. 328

7. —— *Compensation—Partial Incapacity for Work — Maximum Amount of Compensation—Discretion of County Court Judge—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Sched. I., clauses* 1 (*b*), 2.

In awarding compensation under the Workmen's Compensation Act, 1897, to workmen partially incapacitated for work, a county court judge cannot lay down a general rule that he will award the maximum amount of compensation which can be given under the Act in all cases where that amount and the wages which the workman is earning after the accident added together do not exceed the wages which he was earning before the accident. The judge must exercise his discretion with regard to the circumstances of the particular case. WEBSTER *v.* SHARP & Co., LIMITED - - C. A. 218

8. —— *Compensation—Review Weekly Payment, Application to—Res Judicata—Change of Circumstances — Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Sched. I., clause* 12.

Upon an application by employers for a review of the weekly sum paid as compensation to a workman in respect of injuries arising from an accident under the Workmen's Compensation Act, 1897, the county court judge, acting on the opinion of medical experts that the workman was not incapacitated for work, made an award, ordering the weekly payment to be reduced to a nominal amount. On an application for further review of the payment by the workman, evidence was tendered to shew that, since the previous hearing, he had repeatedly applied for employment, and had been unable to obtain it on account of his condition arising from the accident. The county court judge refused to entertain the application on the ground that the condition of the workman was res judicata, and that there had been no change of circumstances since the previous hearing, so as to give him jurisdiction to review the payment :—

Held, that the doctrine of res judicata did not apply to the decision of the county court judge on the previous hearing, and that, there apparently being evidence of a change of circumstances, he ought to entertain the application.

Crossfield & Sons v. *Tanian*, [1900] 2 Q. B. 629, distinguished. SHARMAN *v.* HOLLIDAY & GREENWOOD, LIMITED - - - C. A. 235

9. —— *Compensation — "Scaffolding" — Ladder — Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 1.

Where, during the operation of whitewashing a building, workmen used a ladder by placing it against a wall, and standing or sitting on the rungs of it for the purpose of applying the whitewash, and a county court judge found, on a claim for compensation under the Workmen's Compensation Act, 1897, that the ladder so used was not a scaffolding within the meaning of the 7th section of the Act :—

Held, that it was impossible to say as a matter of law that the ladder must be a scaffolding within the meaning of the Act, and therefore the Court was bound by the finding of the county court judge. CROWTHER *v.* WEST RIDING WINDOW CLEANING COMPANY - - - C. A. 232

10. —— *Compensation—Scaffolding, Sub-contract for — Repair of a Building — Indemnity—Liability of Sub-contractor—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *ss.* 4, 7.

The contractor for the repair of a building over thirty feet in height entered into a sub-contract with another person for the supply and erection of a scaffolding for the purpose of the work and its subsequent removal. A workman in the employ of the sub-contractor, while engaged in the removal of the scaffolding, met with an accident which caused his death. His dependants having recovered compensation under s. 4 of the Workmen's Compensation Act, 1897, against the principal contractor :—

Held, that the latter was entitled to indemnity against the sub-contractor under that section on the ground that he was the "undertaker" in respect of an essential portion of the work of repair. MCCABE *v.* JOPLING AND PALMER'S TRAVELLING CRADLE, LIMITED - C. A. 222

11. —— *Compensation — Seaman — Employment on a Ship in a Dock—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *ss.* 1, 7—*Factory and Workshop Act*, 1901 (1 *Edw.* 7, *c.* 22), *s.* 104.

While a ship was at a buoy in a dock, a seaman belonging to her was employed, as part of his ordinary duty, in clearing out a hold for the reception of cargo. In the course of that employment an accident caused personal injury to him which resulted in his death. On an application for compensation under the Workmen's Compensation Act, 1897, the county court judge held that he had no jurisdiction to award compensation. On appeal :—

Held, by Collins M.R. and Cozens-Hardy L.J., Mathew L.J. dissenting, that the deceased being, at the time of the accident, on a ship in a dock, was employed in a factory, and, there

EMPLOYER AND WORKMAN—*continued.*
being no words in the Act expressly excluding seamen from its operation, the case fell within the provisions of the Act, and the application was well founded. GRIFFIN *v.* HOULDER LINE, LIMITED - - - - - C. A. 510

12. —— *Compensation — "Undertakers" — Warehouse—"Actual Use or Occupation"—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 2—*Factory and Workshop Act*, 1901 (1 *Edw.* 7, *c.* 22), *s.* 104.

The respondents had contracted to erect certain pigeon-holes twelve feet high in the upper storey of a warehouse, which was being built within the precincts of Woolwich Dockyard for the Government by other contractors. A workman, who was employed by the respondents in that work together with ten or twelve other men, was killed through an accident arising out of and in the course of his employment. At the time of the accident, the lower storey of the warehouse was already in use by the Government for the storage of military accoutrements; the foreman and two workmen of the contractors for the building were engaged at work in the upper storey; and the Government by their own workmen were fixing hydraulic cranes at each end of the floor. The clerk of the works of the Government was in charge of the work, to see that the men did their duty, and the contractors complied with the specifications. The premises were locked, and unlocked, by the person in charge of the dockyard, and the keys were kept by the man at the gates. Upon a claim for compensation by the widow of the deceased under the Workmen's Compensation Act, 1897:—

Held, that, the respondents having such use or occupation of part of the warehouse as was necessary for the work which they had contracted to do, they were in actual use or occupation thereof within the meaning of the Factory and Workshop Act, 1901, s. 104, and therefore "undertakers" in respect thereof under the Workmen's Compensation Act, 1897, s. 7, sub-s. 2.

Bartell v. *W. Gray & Co.*, [1902] 1 K. B. 225, followed. WEAVINGS *v.* KIRK & RANDALL C. A. 213

13. —— *Compensation — "Warehouse" — Injury to Workman—Factory—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 2.

A place used in connection with, or as ancillary to, a wholesale business, for the storage of goods in large quantities to be sold in the business, is a warehouse within the meaning of s. 7, sub-s. 2, of the Workmen's Compensation Act, 1897.

Colvine v. *Anderson*, (1902) 5 F. 255, considered. GREEN *v.* BRITTEN & GILSON C. A. 350

14. —— *Compensation — Wharf—"Factory" —Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 2.

Every wharf is a factory within the meaning of the Workmen's Compensation Act, 1897, whether any provision of the Factory Acts is applied to it or not.

Hall v. *Snowden, Hubbard & Co.*, [1899] 2 Q. B. 136, is impliedly overruled by *Raine* v. *Jobson & Co.*, [1901] A. C. 404. BARRETT *v.* KEMP BROTHERS - - - C. A. 517

15. —— *Practice—Appeal—Refusal to direct Review of Taxation of Costs—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Sched. I., clause* 12; *Sched. II., clause* 4.

An appeal will not lie to the Court of Appeal under clause 4 of the Second Schedule to the Workmen's Compensation Act, 1897, against the refusal of a county court judge to direct a review of taxation of costs of an application under clause 12 of the First Schedule to review a weekly payment. RIGBY & Co. *v.* COX C. A. 358

16. —— *Practice—Medical Examination, Obligation to submit to—Medical Referee—Condition precedent to Claim for further Compensation—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Sched. I., clause* 11.

The provision in clause 11 of the First Schedule of the Workmen's Compensation Act, 1897, for suspension of the payment of compensation, "if the workman refuses to submit himself to such examination," refers to the examination to which, under that clause, the workman may be required by the employer to submit, namely, an examination by a medical practitioner provided by the employer, or, if the workman prefers it, by one of the medical referees appointed under the Second Schedule of the Act, and not to the examination by one of the medical referees, to which the clause gives the workman an option to submit, if dissatisfied by the certificate of the medical practitioner provided by the employer: and, therefore, it is not a condition precedent to the workman's right to claim further compensation that he should have exercised that option. NEAGLE *v.* NIXON'S NAVIGATION COMPANY, LIMITED. EDWARDS *v.* GUEST, KEEN & NETTLEFOLDS, LIMITED - C. A. 339

—— Licence—Assessed taxes—"Male servant" —Stable-boy—Apprentice - 288
See REVENUE. 4.

ENGINE — Traction engine — Locomotive — Nuisance—Interim injunction - 404
See HIGHWAY. 1.

EQUITY OF REDEMPTION — Sale of — Jurisdiction - - - - 827
See COUNTY COURT. 4.

ESTATE DUTY — Exemption — Settlement of personal property - - - 749
See REVENUE. 1.

—— Policy of life insurance—"Interest purchased or provided by deceased" 165
See REVENUE. 2.

ESTATE TAIL—Succession duty—Tenant for life —Disentailing deed—Alienation—Succession derived from alienee - 762
See REVENUE. 7.

EVIDENCE—Fraud, Previous acts of—Admissibility—False pretences - - 188
See CRIMINAL LAW. 2.

—— Highway repairable by inhabitants at large —Admissibility - - - 142
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EVIDENCE—*continued.*

—— Person charged—Cross-examination as to character - - - - 184
See CRIMINAL LAW. 1.

EXAMINATION — Officer of company — Officer who has retired - Execution—Judgment against company - - - 794
See PRACTICE. 4.

EXECUTION — "Costs of execution" — High bailiff—Possession money - - 68
See COUNTY COURT. 2.

—— Cross-judgments — Payment of judgment debt into court—Solicitor's lien for costs
See COUNTY COURT. 3. 399

—— Judgment against company—Examination of officer of company—Officer who has retired - - - - 794
See PRACTICE. 4.

—— Married woman — Separate property — Restraint on anticipation—Judgment.
See HUSBAND AND WIFE. 2, 3. 28, 35

—— Stay of execution under judgment—Garnishee order nisi—Bankruptcy notice
See BANKRUPTCY. 5. 94

EXTRAORDINARY TRAFFIC—Repair—Costs—Locomotives Act - - - 62
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FACTORY—Workmen's compensation.
See under EMPLOYER AND WORKMAN.

FACTORY AND WORKSHOP—Workmen's Compensation—"Undertakers" - 213
See EMPLOYER AND WORKMAN. 12.

FALSE PRETENCES—Evidence of previous acts of fraud—Admissibility - - 188
See CRIMINAL LAW. 2.

FENCE—Duty to—Owner—Public well in shaft of abandoned mine—Vested in local authority - - - - 382
See MINE.

FINANCE ACTS.
See under REVENUE.

FINE — Copyhold — Arbitrary fine—Custom to take smaller fine on admittance from tenant of manor than from stranger 689
See COPYHOLD.

FISHERY—*Salmon Fishery—By-law—"Description of Nets"—Salmon Fishery Act*, 1873 (36 & 37 *Vict. c.* 71), *s.* 39, *sub-s.* 3.

By s. 39 of the Salmon Fishery Act, 1873, a board of conservators may make by-laws to determine (inter alia) "the length, size, and description of nets . . . . for taking salmon":—

Held, that a by-law made under this section which prohibited the use of particular kinds of nets was not ultra vires, since the word "description" did not limit the board of conservators to making regulations as to the characteristics of the particular kind of nets. CLAYTON *v.* PEIRSE Div. Ct. 424

FOOD AND DRUGS—Sale of—Institution of prosecution - - - - 847
See ADULTERATION.

FORFEITURE—Rent, Non-payment of—Relief—Underlessee - - - 601
See LANDLORD AND TENANT. 1.

FORGERY—Share certificate issued by secretary—Principal and agent—Scope of employment - - - - 650
See COMPANY.

FRANCHISE.
See Cases under PARLIAMENT.

FRAUD—False pretences—Evidence of previous acts of fraud—Admissibility - 188
See CRIMINAL LAW. 2.

FRAUDS, STATUTE OF—*Interest in Land—Acquisition of Interest not dealt with as part of Contract—Request to another to acquire Interest—Promise to pay Amount expended*—29 *Chas.* 2, *c.* 3, *s.* 4.

A wife residing with her husband, and desirous of moving into a larger house, requested him to buy the residue of the lease of a particular house, and made a verbal promise to him that if he did so she would pay to him the amount of the purchase-money. The husband bought the lease, and the parties moved into the house and resided there. In an action by the wife against her husband he counter-claimed for the amount that he had paid:—

Held, that, as the husband was not bound by the terms of the contract to acquire any interest in land, the promise to pay if he did so was not a contract to which the 4th section of the Statute of Frauds applied. BOSTON *v.* BOSTON C. A. 124

FREIGHT — Lump sum freight — Recovery of balance by charterer. - - 635
See SHIPPING. 2.

GAMING—*Lottery—Sweepstakes on Horse-race—Gaming Act*, 1802 (42 *Geo.* 3, *c.* 119), *s.* 2.

The respondent, the keeper of a beerhouse, arranged for a sweepstakes on a horse-race to be held on his premises. Sixty-one persons entered, each of whom paid 6*d.* to the respondent; and prizes amounting in the aggregate to 30*s.* were paid by the respondent to the persons who respectively drew the first three horses in the race, less the price of a certain quantity of beer which by the conditions of the sweepstakes had to be bought from the respondent by the prize-winners:—

Held, that the sweepstakes was a lottery within s. 2 of the Gaming Act, 1802. HARDWICK *v.* LANE - - - - Div. Ct. 204

GARNISHEE ORDER NISI—Stay of execution under judgment - - - 94
See BANKRUPTCY. 5.

GOODS—Sale of.
See under SALE OF GOODS.

GUARDIANS OF POOR.
See under POOR LAW.

HARROGATE CORPORATION — Building — Deposit of plans—Time limited for commencement of work - - 468
See BUILDING.

HIGH BAILIFF—"Costs of execution"—Possession money—Several warrants against same debtor - - - 68
See COUNTY COURT. 2.

HIGHWAY — *Locomotive — Traction Engine — Nuisance — Interim Injunction — Locomotive Act*, 1861 (24 & 25 *Vict. c.* 70), *s.* 13—*Locomotives Act*, 1898 (61 & 62 *Vict. c.* 29), *s.* 6.

In an action by the Attorney-General, on the relation of a county council, for an injunction to restrain the defendant from using a traction engine upon a road in such a way as to cause a public nuisance:—

Held, that nothing in the Locomotives Act, 1898, had affected the prohibition in s. 13 of the Locomotive Act, 1861, against causing a nuisance by the user upon a highway of a locomotive engine; and that it was no answer to an application for an interim injunction that the damage to the road would not have happened but for the neglect of the county council to keep it in a proper state of repair. ATTORNEY-GENERAL AND MONMOUTHSHIRE COUNTY COUNCIL *v.* SCOTT C. A. 404

2. —— *Repair—Extraordinary Traffic—Action that could have been brought in County Court—Action in High Court—Costs on High Court Scale—Locomotives Act*, 1898 (61 & 62 *Vict. c.* 29), *s.* 12, *sub-s.* 1 (*a*).

A highway authority, acting on the certificate of their surveyor, brought an action in the High Court to recover the expenses incurred by reason of extraordinary traffic for which the defendant was responsible. The amount certified by the surveyor and claimed in the action exceeded 250*l.*, but the verdict of the jury was for 60*l.*, and judgment was entered for that amount with costs. The costs were taxed on the High Court scale. On appeal from the refusal of a judge at chambers to order a review of taxation:—

Held, that the jurisdiction of the High Court to try the action was not affected by the provision of s. 12, sub-s. 1 (*a*), of the Locomotives Act, 1898, that expenses not exceeding 250*l.* may be recovered in the county court, and that the taxation of costs was rightly made on the High Court scale. CHESTERFIELD RURAL DISTRICT COUNCIL *v.* NEWTON - - - - C. A. 62

—— Streets.
See under STREETS.

HORSE-RACE—Sweepstakes on—Lottery 204
See GAMING.

HUSBAND AND WIFE—*Practice—Wife's Tort—Action against Husband and Wife jointly—Libel—Pleading—Payment into Court—Denial of Liability—Rules of Supreme Court, Order XXII., r.* 1.

In a statement of defence in a common law action of tort against a husband and his wife jointly for a libel published by the wife, the husband pleaded payment of money into court in satisfaction of the claim, and the wife pleaded in denial of liability:—

Held, that such a mode of pleading was inadmissible. BEAUMONT *v.* KAY - C. A. 292

2. —— *Separate Property—Restraint on Anticipation — Married Woman — Ante-nuptial Debt, Judgment for—Execution—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 19.

A judgment against a married woman in respect of a debt contracted by her before marriage cannot be enforced by way of equitable execution against her separate property subject to a restriction against anticipation, where the restriction is not contained in a settlement, or agreement for a settlement, of her own property, made or entered into by herself. BIRMINGHAM EXCELSIOR MONEY SOCIETY *v.* LANE - C. A. 35

3. —— *Separate Property — Restraint upon Anticipation—Married Women's Property Acts—Contract by Married Woman during Coverture—Judgment after cessation of Coverture—Married Women's Property Act*, 1893 (56 & 57 *Vict. c.* 63), *s.* 1.

Where a married woman, who was entitled to the income of trust funds for life, for her separate use, without power of anticipation, signed promissory notes in 1897, and, her husband having subsequently died, judgment was, after his death, recovered against her in an action on the notes:—

Held, on the authority of *Barnett* v. *Howard*, [1900] 2 Q. B. 784, that a receiver could not be appointed to receive the before-mentioned income by way of equitable execution on the judgment. BROWN *v.* DIMBLEBY - - - C. A. 28

—— Franchise—Husband and wife living together—Wife, owner—Husband, tenant.
See PARLIAMENT. 1. 80

—— Settlements.
See under SETTLEMENT.

IMPOSSIBILITY—Performance—Contract
See CONTRACT. 1, 2. 493, 565

INCOME TAX—Bank—Purchase of business of another bank - - - 149
See REVENUE. 3.

INDEMNITY—Workmen's compensation—Scaffolding, Sub-contract for - - 222
See EMPLOYER AND WORKMAN. 10.

INJUNCTION—Locomotive—Traction engine—Nuisance—Interim injunction - 404
See HIGHWAY. 1.

INN—Licensing Acts.
See under LICENSING ACTS.

INSURANCE, LIFE — *Contract — Illegality — Policy on the Life of Another—Absence of Insurable Interest—Recovery of Premiums—Life Assurance Act*, 1774 (14 *Geo.* 3, *c.* 48), *ss.* 1, 2.

The agent of the defendants, an insurance company, in good faith and believing his statement to be true, represented to the plaintiff that an insurance effected by him on the life of his mother would be a valid insurance, and the plaintiff, relying upon that representation, effected such an insurance and paid premiums thereunder. In an action to recover back the premiums:—

Held, that, assuming the policy to be illegal and void for want of an insurable interest, the representation having been innocently made by the agent, the parties were in pari delicto, and the premiums could not be recovered back.

Decision of the Divisional Court, [1903]

INSURANCE, LIFE—*continued.*

2 K. B. 92, upon this point reversed. HARSE *v.* PEARL LIFE ASSURANCE COMPANY - **C. A. 558**

2. —— *Policy — Warranty not to commit Suicide—Condition Precedent—Policy for Benefit of Third Party.*

In an application to the defendants for a policy of life insurance, which application was to be part of the contract, one F. warranted and agreed that he would not commit suicide, whether sane or insane, during the period of one year from the date of the contract. The policy, which was issued in consideration of the application, was expressed to be for the benefit of the plaintiff company, who were creditors of F. F. committed suicide within the year, while temporarily insane:—

Held, that the policy was avoided, and that the plaintiffs could not recover upon it. ELLINGER & CO. *v.* MUTUAL LIFE INSURANCE COMPANY OF NEW YORK - - **Bigham J. 832**

—— Policy—Estate duty — Marriage settlement —"Interest purchased or provided by deceased" - - - - **165**
See REVENUE. 2.

INSURANCE, MARINE — *Policy on Goods — Inland Voyage on River—Goods carried on Deck —Liability of Underwriters.*

The plaintiffs insured goods with the defendants against all risks during transit from London to Neuenahr on the Rhine viâ Amsterdam. The goods on arrival at Amsterdam were transshipped on to a Rhine steamer and there stowed on deck for carriage up the river to Neuenahr. While the goods were so stowed on deck a fire broke out on the steamer and the goods were burnt. There was evidence that it was a common practice for Rhine steamers to carry goods on deck:—

Held, that the general rule, which exempts underwriters on cargo from liability for loss of goods carried on deck during a voyage by sea, does not apply to an inland voyage upon a particular river contemplated by the policy, upon which river there is a usage to carry cargoes on deck.

Quære, whether the above general rule applies in any case to an inland voyage upon a river. APOLLINARIS COMPANY *v.* NORD DEUTSCHE INSURANCE COMPANY - - - **Walton J. 252**

2. —— *Suing and Labouring Clause—Salvage —Claim of Underwriters to Salvage Award.*

By a policy of insurance a vessel was insured against "total or constructive total loss only." The policy contained the usual suing and labouring clause. The vessel having struck on a reef her owner abandoned her, and the underwriters incurred expense in floating her off and bringing her to land. In an action on the policy in which the owner claimed as for a total loss, and the underwriters counter-claimed for the expenses to which they had been put in salving the vessel, the jury found that the vessel was not a total loss, and that the underwriters were not liable on the policy:—

Held, that the underwriters were not entitled to recover the expenses of salving the vessel, either at common law, since those expenses were

INSURANCE, MARINE—*continued.*

within the suing and labouring clause in the policy, or as a salvage award, since the underwriters were parties interested in the vessel. CROUAN *v.* STANIER - - **Kennedy J. 87**

3. —— *Voyage Policy—Construction—Termination of Risk—Insurance for Period after Arrival of Ship—"Days," how to be Reckoned.*

In a policy of marine insurance on a ship the insurance was described as being for a voyage to Algoa Bay "and for 30 days in port after arrival," and as continuing "until the ship with all her ordnance, tackle, apparel, &c., shall be arrived at as above upon the said ship, &c., until she hath there moored at anchor in good safety." The ship arrived in Algoa Bay, and was there moored at anchor in good safety at 11.30 A.M. on August 2, 1902. She remained in Algoa Bay until September 1, 1902, and was there totally lost through perils insured against at 4.30 P.M. on that day:—

Held (affirming the judgment of Bigham J., [1903] 2 K. B. 363), that the expression "30 days" in the policy meant thirty consecutive periods of twenty-four hours, the first of which began to run at 11.30 A.M. on August 2; and, therefore, that the insurance had come to an end before the loss occurred. CORNFOOT *v.* ROYAL EXCHANGE INSURANCE CORPORATION **C. A. 40**

—— Discovery—Ship's papers—Action by underwriters—Recovery of money overpaid
See PRACTICE. 3. **784**

INTERNATIONAL LAW.
See under CONFLICT OF LAWS.

JUDGMENT — Cross-judgments — Execution — Payment of judgment debt into court—Solicitor's lien for costs - - **399**
See COUNTY COURT. 3.

—— Execution—Judgment against company—Examination of officer of company—Officer who has retired - - **794**
See PRACTICE. 4.

—— Married woman—Separate property—Restraint on anticipation—Execution
See HUSBAND AND WIFE. 2, 3. **28, 35**

—— Power of Court of Bankruptcy to go behind judgment—Irregularity in form of judgment - - - - - **572**
See BANKRUPTCY. 1.

—— Stay of execution under—Garnishee order nisi—Bankruptcy notice - - **94**
See BANKRUPTCY. 5.

JUDICATURE ACT—Debt, Assignment of—Advance of money to vendor of goods—Direction to pay price to lender - **387**
See DEBT.

—— Injurious affection—Right of assignee to sue in own name - - — **277**
See LANDS CLAUSES ACTS. 2.

JURISDICTION—Costs of licensing justices—Licensing appeals - - - **545**
See LICENSING ACTS. 1.

—— County court—Sale of equity of redemption
See COUNTY COURT. 4. **827**

JURISDICTION—*continued.*

—— Justices—Equal division of opinion—Power of adjournment - - - 554
See JUSTICES.

—— Review, Jurisdiction of High Court to—Error in law apparent on face of order 6
See PRACTICE. 5.

—— Service of summons without the—Application to enforce award - - 118
See ARBITRATION.

JURY—Question whether for judge or jury—Covenant—Reasonableness of restriction
See RESTRAINT OF TRADE. 45

JUSTICES — *Jurisdiction — Equal Division of Opinion — Power of Adjournment — Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43), *s.* 16.

An information under the Licensing Acts was heard before two justices, who, after hearing the evidence, retired to consider their decision; on their return into Court they announced that they were divided in opinion, and adjourned the information to a future day, when it was reheard before five justices, including the two who had previously heard it. An objection taken to their power to rehear the information was overruled, and in the result they convicted the person charged:—

Held, that the announcement of the justices at the original hearing that they were divided in opinion did not amount to a dismissal of the information so as to deprive them of their power of adjournment under s. 16 of the Summary Jurisdiction Act, 1848; that the power of adjournment was exercised "during such hearing" within the meaning of that section, and that there was consequently jurisdiction to rehear the information.
BAGG *v.* COLQUHOUN - - - **Div. Ct. 554**

—— Buildings, Notice of—Building ancillary to work authorized by private Act—Inconsistent enactments - - - 474
See LONDON. 2.

—— Costs of licensing justices—Jurisdiction—Licensing appeals - - - 545
See LICENSING ACTS. 1.

—— Distress—Poor-rate—Reasonable costs of selling distress - - - 811
See DISTRESS. 1.

—— Fishery—Salmon fishery—By-law—"Description of nets" - - - 424
See FISHERY.

—— Foods and drugs, Sale of—Institution of prosecution - - - - 847
See ADULTERATION.

—— Licence—Assessed taxes—"Male servant"—Stable-boy—Apprentice - 288
See REVENUE. 4.

—— Licensing Acts.
See under LICENSING ACTS.

—— Lodging-house—Lime-washing—Validity of by-law - - - - 615
See LONDON. 3.

—— Lodging-house—Water-closet accommodation—Validity of by-law - - 610
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JUSTICES—*continued.*

—— London—Building—Drainage of houses on low-lying land - - - 283
See LONDON. 1.

—— Nuisance—Chimney sending forth black smoke—Funnel of steam-tug - 804
See LONDON. 5.

—— Police—Pension—"Approved service"—Continuity of service - - 522
See POLICE.

—— Poor-rate, Appeal against—Consent of guardians—Notice of meeting of guardians 484
See POOR LAW.

—— Rateability of sporting rights—Assessment in proportion of one-fourth of net annual value - - - - 678
See RATES. 2.

—— Rates, Recovery of—Illegal distress—Liability of overseers for act of assistant overseer - - - - 743
See RATES. 1.

—— Signature by two justices, Necessity for—Nuisance in respect of drains—Order to abate - - - - 798
See NUISANCE. 2.

LADDER—Workmen's compensation—"Scaffolding." - - - - - 232
See EMPLOYER AND WORKMAN. 9.

LAND TAX—*Public Underground Lavatories—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *ss.* 44, 45—*Land Tax Act*, 1797 (38 *Geo.* 3, *c.* 5), *s.* 4.

A sanitary authority who under the powers conferred by the Public Health (London) Act, 1891, provide and maintain public lavatories under the public streets have not such rights of ownership in the lavatories as to render them liable to be charged with land tax in respect of them. WESTMINSTER CORPORATION *v.* JOHNSON. THE SAME *v.* FULLER - - **Wright J. 19**

LANDLORD AND TENANT—*Forfeiture for Non-payment of Rent—Underlessee—Relief against Forfeiture—Conveyancing and Law of Property Act*, 1892 (55 & 56 *Vict. c.* 13), *s.* 4—*Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 14, *sub-s.* 8—*Common Law Procedure Act*, 1860 (23 & 24 *Vict. c.* 126), *s.* 1.

Sect. 4 of the Conveyancing and Law of Property Act, 1892, is not a mere amendment of s. 14 of the Conveyancing and Law of Property Act, 1881, extending the Provisions of that section to underlessees, but an independent provision for affording relief to underlessees against forfeiture for breach of any covenant in the head lease, and therefore relief can be given under s. 4 to an underlessee against a forfeiture of the head lease for non-payment of rent. GRAY *v.* BONSALL - - - - **C. A. 601**

2. —— *Notice to quit—Tenancy at Yearly Rent—Three Months' Notice—Expiration of Notice.*

By an agreement of tenancy premises were let "at an inclusive rental of 25*l.* per annum from October 1; the tenant to pay rates and

LANDLORD AND TENANT—*continued.*
taxes in addition; three months' notice on either side to terminate this agreement":—

Held, that this agreement created a yearly tenancy determinable by three months' notice expiring with a year of the tenancy and not at any other time. DIXON *v.* BRADFORD AND DISTRICT RAILWAY SERVANTS' COAL SUPPLY SOCIETY Div. Ct. 444

3. —— *Outgoings—Tenancy for Three Years—Agreement by Tenant to Pay Outgoings—Order by Sanitary Authority to reconstruct Drain—Liability of Tenant.*

The plaintiff let a house to the defendant for a term of three years at the yearly rent of 55*l.*, the defendant agreeing to pay all "outgoings in respect of the premises." During the tenancy the plaintiff, in obedience to an order from the sanitary authority, reconstructed the drainage system of the house at a cost of 83*l.* 10*s.*:—

Held, affirming the decision of Wright J., [1903] 1 K. B. 873, that the defendant was liable under the agreement to repay to the plaintiff the amount so expended. STOCKDALE *v.* ASCHERBERG C. A. 447

4. —— "*Outgoing*"—*Yearly Tenancy—Covenant by Tenant to pay Outgoings—Defective Drain, Reconstruction of—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *ss.* 3, 4.

The owners of a house let it to the defendant for a term of three years at a rent of 70*l.*, the defendant agreeing to pay "all rates, taxes, assessments, and outgoings whatsoever in respect of the said premises." After the expiry of the term the defendant continued in occupation of the house without any fresh agreement, and paid rent for it at the same rate. Subsequently, and whilst the defendant was still in occupation, the sanitary inspector of the district served upon the owners of the house an intimation under s. 3 of the Public Health (London) Act, 1891, that the house was in such a state as to be a nuisance owing to the drain being defective. The owners gave notice to the defendant, and required him to do the work necessary to abate the nuisance. Upon the defendant refusing to do so, the owners proceeded to do the work themselves at once without waiting to be served by the sanitary authority with a notice under s. 4 of the said Act requiring them to do the work. The expense incurred by them in doing the work amounted to 70*l.* 1*s.* 6*d.* In an action by the owners to recover that sum from the defendant under his covenant to pay all outgoings:—

Held, that the action could not be maintained upon the grounds—

1. That the owners, having done the work immediately upon receipt of the intimation of the existence of the nuisance and before service of any notice requiring them to abate it, did it voluntarily and not under any obligation, and that the expenditure was consequently not an "outgoing" within the meaning of the covenant; and

2. That, even if a covenant to pay outgoings would cover such an expenditure, it was not, having regard to the proportion which the expenditure bore to the yearly rent, a covenant which was applicable to a yearly tenancy, and

LANDLORD AND TENANT—*continued.*
that the defendant in holding over after the expiry of his term and paying rent could not be presumed to have intended to become a yearly tenant on the terms of such an obligation.

Valpy v. *St. Leonards Wharf Co.*, (1903) 1 L. G. R. 305, followed. HARRIS *v.* HICKMAN Wright J. 13

5. —— *Re-entry, Proviso for—Lease—Negative Covenant — Covenant not to assign or sublet — Covenant to be "performed."*

A lease of a house contained covenants by the lessee to pay the rent, rates, and taxes, to repair, and not to assign or underlet the premises without the lessor's consent: and it contained a proviso that "if the lessee shall commit any breach of the covenants hereinbefore contained, and on his part to be performed, then the said lessor may re-enter upon the said premises:—

Held, reversing the judgment of Wright J., [1903] 2 K. B. 241, that the proviso for re-entry applied to a breach of the covenant not to assign or underlet the premises without the consent of the lessor. HARMAN *v.* AINSLIE - C. A. 698

—— Distress—Sale by auction of goods distrained —Purchase by landlord - - 820
See DISTRESS.

—— Tithe rent-charge—Agreement by tenant to repay amount of to landlord—Validity of agreement - - - 531
See TITHE.

LANDS CLAUSES ACTS—*Compensation—Compulsory Sale of Land—Interest in Land—Right to supply Refreshments in a Theatre — Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 68.

By a contract made between the lessees of a theatre and the plaintiffs, it was agreed that the plaintiffs should have the exclusive right for a term of years to supply refreshments in the theatre, and for that purpose should have the necessary use of the refreshment rooms, bars, and wine cellars of the theatre, and that they should have an exclusive right to advertise, and let spaces for advertisements, in certain parts of the theatre:—

Held, that the contract did not confer on the plaintiffs an interest in land which could form the subject of compensation under the Lands Clauses Consolidation Act, 1845, s. 68. FRANK WARR & CO., LIMITED *v.* LONDON COUNTY COUNCIL - - - - - C. A. 713

2. —— *Compensation for injurious Affection, Right to—Assignment of—Right of Assignee to sue in own Name—Damages for Tort—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25.

The defendants constructed under statutory powers a tunnel for the purposes of their railway. The construction of the tunnel caused a subsidence of the soil, whereby certain houses, not taken by the defendants, suffered structural damage; and the owners of the houses thereupon became entitled to compensation for injurious affection under s. 68 of the Lands Clauses Act, 1845. After the damage had occurred the owners of the houses assigned their interests in them, together with their rights to compensation, to the plaintiff. At an inquiry held for the

LANDS CLAUSES ACTS—*continued.*
purpose a jury assessed the amount of compensation payable in respect of the damage done to the houses. The action was brought by the plaintiff as assignee in her own name upon the verdict and judgment obtained at the said inquiry:—

Held, that compensation for injurious affection under s. 68 is in the nature of damages for a tort; that a right to sue for damages in tort is not a legal chose in action within the meaning of s. 25 of the Judicature Act, 1873; and that consequently the plaintiff was not entitled to sue as assignee in her own name. DAWSON *v.* GREAT NORTHERN AND CITY RAILWAY COMPANY - - - - **Wright J. 277**

3. —— *Compulsory Powers—Notice to treat—Service—Duration of Powers under Special Act—"Three Years from the passing of this Act"—Exclusion of Day on which Act received Royal Assent—Railway Company.*

Under a special Act, which incorporated the Lands Clauses Act, 1845, a railway company were empowered to take lands compulsorily for the purpose of their undertaking, and the powers of the company for this purpose were to cease after the expiration of three years from the passing of the Act. The Act received the Royal assent on August 9, 1899, and on August 9, 1902, the company gave to the plaintiffs a notice to treat for the purchase of lands belonging to them and scheduled in the special Act. On an application for an injunction to restrain the company from proceeding under this notice:—

Held, that the day of the passing of the Act must be excluded in the computation of the three years, and that the notice was served in time. GOLDSMITHS' COMPANY *v.* WEST METROPOLITAN RAILWAY COMPANY - - - **C. A. 1**

LAVATORIES—Land tax—Public underground lavatories - - - - **19**
See LAND TAX.

LEASE—*Covenants — Assignment of Reversion—Liability of Assignor on express Covenants in Lease—32 Hen. 8, c. 34, ss. 1, 2.*

A lessor who has assigned his reversion remains liable upon his express covenants, running with the reversion, in a lease for years under seal. STUART *v.* JOY - - **C. A. 362**

—— Landlord and Tenant.
See under LANDLORD AND TENANT.

LETTING—Covenant not to assign or sublet—Covenant to be "performed"—Proviso for re-entry - - - **698**
See LANDLORD AND TENANT. 5.

LIBEL—Pleading—Payment into court—Denial of liability - - - - **292**
See HUSBAND AND WIFE. 1.

LICENCE—Licensing Acts.
See under LICENSING ACTS.

—— "Male servant"—Stable-boy—Apprentice
See REVENUE. 4. **288**

LICENSING ACTS—*Justices—Quarter Sessions—Jurisdiction—Licensing Appeals—Costs of Licensing Justices—Alehouse Act*, 1828 (9 *Geo.* 4, *c.* 61), *s.* 29—*Licensing Act*, 1902 (2 *Edw.* 7, *c.* 28), *s.* 20.

Upon the hearing of an appeal to quarter sessions from licensing justices, the licensing justices are entitled in the case of an unsuccessful appeal to an order under s. 29 of the Alehouse Act, 1828, upon the appellant for payment of such sum by way of costs as in the opinion of the Court will indemnify them from all costs and charges to which they may have been put; in the case of a successful appeal to a like order under s. 20 of the Licensing Act, 1902, upon the treasurer of the county or place for which the licensing justices acted.

Upon any such appeal the licensing justices are entitled to retain any solicitor whom they select to act for them, and they cannot be compelled to appear by the county solicitor, although it may be part of the duties of that officer to act for licensing justices upon the hearing of appeals from their decisions. Where licensing justices appear by their own solicitor, the Court of quarter sessions has no jurisdiction, in making an order under either s. 29 of the Alehouse Act, 1828, or s. 20 of the Licensing Act, 1902, to attach to it a direction to the clerk of the peace that in ascertaining the amount of the costs he is to exclude the personal professional charges of the solicitor employed by the licensing justices. THE KING *v.* WEST RIDING JUSTICES - - **Div. Ct. 545**

2. —— *Licence—Renewal—Discretion of Justices—Many Public-houses in Locality—Selection of particular House, and Refusal to renew Licence.*

On appeal to quarter sessions against the refusal of a licence a map of the locality was produced, and it was proved that within a short distance of the house in question there were a very large number of licensed houses. No notice of objection had been served on any of these houses; but notice of objection had been served on the house in question by the direction of the borough justices, the ground of objection being that the licence was not required in the locality. The house had been a fully licensed house for ten years, and the character of the locality had not altered except that the population had increased. No further evidence was adduced by the respondents:—

Held, by Lord Alverstone C.J. and Lawrance J. (Kennedy J. dissenting), that this evidence did not entitle the quarter sessions to refuse to renew the licence. RAVEN *v.* SOUTHAMPTON JUSTICES **Div. Ct. 430**

3. —— *Offences—Keeping open during Prohibited Hours—Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *s.* 9.

In order to constitute the offence of keeping open licensed premises for the sale of intoxicating liquor during prohibited hours, within the meaning of s. 9 of the Licensing Act, 1874, there must be a keeping open of the premises in the sense that people can get in from the outside to procure intoxicating liquor, or can get it supplied to them when outside. COMMISSIONER OF POLICE *v.* ROBERTS - - - - **Div. Ct. 369**

LIEN—Solicitor's lien for costs — Cross-judgments—Execution - - - **399**
See COUNTY COURT. 3.

LIFE INSURANCE.
See under INSURANCE, LIFE.

LIGHTERMAN—Negligence of carrier's servants —Liability of carrier - - 412
See CARRIER.

LIME-WASHING—Lodging-house—Validity of By-law - - - - 615
See LONDON. 3.

LOCAL GOVERNMENT—Buildings.
See under BUILDING.

—— Nuisance—Chimney sending forth black smoke—Funnel of steam-tug - 804
See LONDON. 5.

—— Nuisance in respect of drains—Order to abate—Necessity for signature by two justices—Public health - - 798
See NUISANCE. 2.

—— Streets.
See under STREETS.

LOCOMOTIVES—County court, Action that could have been brought in—Action in High Court—Costs on High Court scale 62
See HIGHWAY. 2.

—— Traction engine — Nuisance — Interim injunction - - - - 404
See HIGHWAY. 1.

LODGING-HOUSE—Lime-washing — Validity of by-law - - - - 615
See LONDON. 3.

LONDON—*Building—Drainage of Houses on low-lying Land—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 122.

Land is "so situate as . . . . to admit of being drained by gravitation into an existing sewer" within the meaning of s. 122 of the London Building Act, 1894, if it is situate at such a level that the drainage from it will find its way by gravitation into the sewer under the ordinary conditions of the sewer, although during a substantial number of days in the year that drainage is in fact prevented from passing into the sewer by reason of the sewer becoming surcharged with rain-water and of the pressure of that water inside the sewer closing a flap or valve at the inlet of the sewer. ELLIS *v.* LONDON COUNTY COUNCIL - - - - **Div. Ct. 283**

2. —— *Building—Notice of Buildings before commencing the same—Building ancillary to Work authorized by private Act—Inconsistent Enactments — Local Government — Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 76.

By s. 76 of the Metropolis Management Act, 1855, it is required that before beginning to lay or dig out the foundations of any new building seven days' notice in writing should be given to the local authority by the person intending to build. In 1894 a dock company obtained statutory authority to make certain alterations in their dock premises, and it became necessary as ancillary to those alterations to demolish a certain workshop and erect another in its place. No notice of the intention of the dock company to erect the new workshop was given to the local authority:—

Held, that the interference and control involved in s. 76 of the Metropolis Management Act, 1855, was inconsistent with the powers conferred upon the dock company under their statutory authority, and that there was therefore no need for them to give notice to the local authority of their intention to erect the new workshop. SURREY COMMERCIAL DOCK COMPANY *v.* BERMONDSEY CORPORATION - **Div. Ct. 474**

3. —— *Lodging-house — Lime-washing — Validity of By-law — Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *s.* 94, *sub-s.* 1 (*d*), (*e*).

In two metropolitan boroughs a by-law with respect to houses let in lodgings was made by the council of the borough under s. 94 of the Public Health (London) Act, 1891, requiring the landlord of a lodging-house (the definition of which included any house occupied by members of more than one family) to cause every part of the premises to be cleansed, and the ceilings and interior walls to be lime-washed, in the first week of April in every year. In one case "landlord" was defined as the person who received the rackrent of the premises; and in the other case the definition included the person who received the profits arising from the letting of the house as a lodging-house:—

Held, that having regard to the wide definition of lodging-house and landlord the by-law was, in both cases, unreasonable and bad, because it contained no provision that a landlord, before becoming liable to a penalty for a breach of the by-law, should receive notice that the requirements of the by-law had not been complied with:

Held, also, by Lord Alverstone C.J. and Kennedy J., Wills J. dissenting, that in so far as the by-law required the work to be done in the first week of April, the by-law was not unreasonable. STILES *v.* GALINSKI. NOKES *v.* ISLINGTON CORPORATION (No. 2) - - **Div. Ct. 615**

4. —— *Lodging-house—Water-closet Accommodation—Validity of By-law—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *ss.* 37, 39.

A by-law with respect to water-closet accommodation made by the London County Council under the provisions of s. 39, sub-s. 1, of the Public Health (London) Act, 1891, required the landlord or owner of any lodging-house to provide and maintain in connection therewith water-closet, earth-closet, or privy accommodation in the proportion of not less than one water-closet, earth-closet, or privy for every twelve persons, and a penalty was provided for any offence against the by-law:—

Held, that the by-law was unreasonable and bad, because it contained no provision for giving notice of the requirements of the sanitary authority to the person against whom it was contemplated that proceedings should be taken for breach of the by-law. NOKES *v.* ISLINGTON CORPORATION (No. 1) - - - **Div. Ct. 610**

5. —— *Nuisance — "Chimney" — Chimney sending forth Black Smoke—Funnel of Steam Tug —Specification in Order of Works to be Executed —Local Government — Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *s.* 5, *sub-s.* 5; *s.* 24, *sub-s.* (*b*).

By s. 24 (*b*) of the Public Health (London) Act, 1891, "any chimney (not being the chimney of a private dwelling-house) sending forth black

LONDON—*continued.*
smoke in such quantity as to be a nuisance" is liable to be dealt with summarily:—

Held, that the funnel of a steam-tug was a chimney within the section.

An abatement or prohibition order is not bad because it does not, under s. 5, sub-s. 5, of the Act, specify the works to be executed for the purpose of abating or preventing the recurrence of the nuisance, although the person on whom the order is made may have required them to be specified. TOUGH *v.* HOPKINS - **Div. Ct. 804**

—— Covenant by tenant to pay outgoings—Yearly tenancy—Defective drain 13
See LANDLORD AND TENANT. 4.

—— Land tax—Public underground lavatories
See LAND TAX. 19

—— Nuisance — Black smoke — Chimney of private dwelling-house—Club - 208
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LOTTERY—Sweepstakes on horse-race - 204
See GAMING.

MANOR—Custom to take smaller fine on admittance from tenant of manor than from stranger - - - - 689
See COPYHOLD.

MARINE INSURANCE.
See under INSURANCE, MARINE.

MARRIAGE SETTLEMENT.
See under SETTLEMENT.

MARRIED WOMAN.
See under HUSBAND AND WIFE.

MASTER—Reference of action to—Appeal 56
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MASTER AND SERVANT.
See under EMPLOYER AND WORKMAN.

MEDICAL EXAMINATION — Obligation to submit to—Workmen's Compensation
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MEETINGS—Notice—Appeal against poor-rate Consent of guardians - - 484
See POOR LAW.

MERCHANT SHIPPING.
See under SHIPPING.

METALLIFEROUS MINES.
See under MINE.

METROPOLIS.
See under LONDON.

MINE — *Owner — Duty to fence — Metalliferous Mines Regulation Act*, 1872 (35 & 36 *Vict. c.* 77), *ss.* 13, 41—*Public Well in Shaft of abandoned Mine—Vested in Local Authority—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 64.

By s. 13 of the Metalliferous Mines Regulation Act, 1872, where a mine is abandoned or the working thereof is discontinued, the owner thereof and every other person interested in the minerals of the mine shall cause the top of the shaft to be fenced; by s. 41 the term "mine" includes a shaft belonging to a mine, and the term "owner" does not include a person who is merely the owner of the soil and not interested in the minerals of the mine.

MINE—*continued.*

The shaft of an abandoned mine contained water, and was used as and was in fact a public well, which under s. 64 of the Public Health Act, 1875, was vested in the defendants, the local authority:—

Held, that the defendants were not the owners of the mine or of the shaft within the Metalliferous Mines Regulation Act, 1872, and were, therefore, not liable in an action for damage sustained through the top of the shaft not having been fenced. KNUCKEY *v.* REDRUTH RURAL COUNCIL - - - - **Div. Ct. 382**

MISDEMEANOUR — Bankrupt—Discharge, Refusal of — Rehearing before Court of Appeal - - - - 106
See BANKRUPTCY. 2.

MORTGAGE—Redemption, Sale of equity of—County court—Jurisdiction - 827
See COUNTY COURT. 4.

MUNICIPAL CORPORATION.
See under CORPORATION.

NEGLIGENCE — Lighterman — Negligence of carrier's servants—Liability of carrier
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—— Servant — Bailor and bailee — Injury to article bailed — Liability of master — Bailment - - - 628
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—— Workmen's compensation.
See under EMPLOYER AND WORKMAN.

NETS—Salmon fishery—By-law—"Description of nets" - - - - 424
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NOTICE—Appeal against poor-rate—Consent of guardians — Notice of meeting of guardians - - - - 484
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—— Bankruptcy—Garnishee order nisi—Stay of execution under judgment - 94
See BANKRUPTCY. 5.

—— Bankruptcy notice—Address of creditor
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—— Building ancillary to work authorized by private Act—Inconsistent enactments
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—— Compulsory powers — "Three years from the passing of this Act"—Exclusion of day on which Act received Royal assent - - - - 1
See LANDS CLAUSES ACTS. 3.

—— Disqualification — Election — Right of opponent to claim seat - - 74
See CORPORATION.

—— To quit—Tenancy at yearly rent—Three months' notice—Expiration of notice
See LANDLORD AND TENANT. 2. 444

NUISANCE—*Chimney of Private Dwelling-house—Club—Black Smoke—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *s.* 24 (*b*).

By the Public Health (London) Act, 1891, s. 24 (*b*), "any chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such quantity as to be a nuisance" is

NUISANCE—*continued.*
declared to be a nuisance liable to be dealt with summarily under the Act.

A club of 750 members, managed by a committee of the members, had for many years occupied premises which had previously been a private dwelling-house; the premises comprised the ordinary accommodation of a club, and there were five bedrooms for the use of the members and eight for the club staff. In the basement were cooking ranges, a large roasting grate, and a vertical boiler with furnace attached, which latter were used for heating the premises; the smoke from all of them was discharged into one flue or chimney, which sent forth black smoke in such quantity as to be a nuisance. A summons against the respondent, the club secretary, for making default in complying with a notice of the local authority requiring him to abate the nuisance was dismissed by the magistrate on the ground that the chimney was the chimney of a private dwelling-house:—

Held, that the dismissal of the summons was wrong; that the premises as used were not a private dwelling-house within the meaning of the section, and that the respondent ought to have been convicted of the offence charged. McNair *v.* Baker - - - **Div. Ct. 208**

2. —— *Practice—Local Government—Nuisance in respect of Drains—Order to abate—Necessity for Signature by Two Justices—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 96.

An order of a Court of summary jurisdiction under s. 96 of the Public Health Act, 1875, must be signed by two justices. Wing *v.* Epsom Urban District Council - **Div. Ct. 798**

—— Chimney sending forth black smoke—Funnel of steam-tug—Public Health (London) - - - - **804**
See London. 5.

—— Locomotive — Traction engine — Interim injunction - - - - **404**
See Highway. 1.

OFFENCES—Keeping open during prohibited hours - - - - **369**
See Licensing Acts. 3.

—— Undischarged bankrupt—Obtaining credit —Limit of punishment - - **181**
See Bankruptcy. 3.

OUTGOINGS—"Outgoing"—Yearly tenancy—Defective drain—Reconstruction **13**
See Landlord and Tenant. 4.

—— Tenancy for three years—Liability of tenant
See Landlord and Tenant. 3. **447**

OVERSEER—Illegal distress—Recovery of rates — Liability of overseers for act of assistant overseer - - - **743**
See Rates. 1.

OWNER—Duty to fence—Public well in shaft of abandoned mine—Vested in local authority - - - - - **382**
See Mine.

PARLIAMENT—*Franchise—Qualification—Husband and Wife living together—Wife, Owner—*
PARLIAMENT—*continued.*
Husband, Tenant—Occupier—Representation of the People Act, 1867 (30 & 31 *Vict. c.* 102), *s.* 3.

A husband living with his wife in a house of which the wife is the owner and of which the husband is tenant under an agreement of tenancy with the wife is entitled to be registered as a voter under s. 3 of the Representation of the People Act, 1867. Pearce *v.* Merriman **Div. Ct. 80**

2. —— *Franchise—Qualification—Lodger—Claim—Objection—Evidence—Rateable Value—Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *ss.* 23, 28, *sub-ss.* 10, 11.

The power of a revising barrister to disallow a claim to the lodger franchise after notice of objection is not confined to cases where primâ facie proof of the ground of objection has been given in the manner specified in s. 28, sub-s. 10, of the Parliamentary and Municipal Registration Act, 1878, and the claimant has failed to make good his claim. Although the requirements of sub-s. 10 as to what is to be deemed to be primâ facie proof of the ground of objection may not have been satisfied, the revising barrister is entitled, and ought, to give effect to the evidence given in support of the objection, if in his opinion it outweighs the primâ facie evidence of the claim afforded by the declaration of the claimant, and any other evidence adduced in support of the claim. No appeal lies from a decision of the revising barrister as to the effect of the evidence.

In determining whether lodgings, in respect of which the lodger franchise is claimed, are of the "clear yearly value, if let unfurnished, of 10*l.* or upwards," the rateable value of the house in which the lodgings are situate is an element of proof, though not conclusive, which the revising barrister is entitled to take into consideration.

Where a claim to the lodger franchise is duly made, a revising barrister has no power to make the personal attendance of the claimant at his Court a condition of allowing the claim. Jenkins *v.* Grocott - - - **Div. Ct. 374**

3. —— *Franchise — Qualification — Schoolmaster—Permission to occupy House—Inhabitant Occupier—Representation of the People Act*, 1884 (48 & 49 *Vict. c.* 3), *ss.* 2, 3.

A schoolmaster was permitted, but not required, by his employers to live in a certain house so long as he continued to hold the appointment of schoolmaster:—

Held, that the schoolmaster did not occupy the house by virtue of his employment, and, therefore, was entitled to have his name inserted in Division I. of the list of voters. Dover *v.* Prosser - - - - **Div. Ct. 84**

PAYMENT INTO COURT—Costs—County court, Judgment for defendant in - **535**
See County Court. 1.

—— Libel—Pleading—Denial of liability **292**
See Husband and Wife. 1.

PENSION—"Approved service"—Continuity of service - - - - **522**
See Police.

PERFORMANCE—Contract—Impossibility
See CONTRACT. 1, 2. 493, 565

PLAN—Deposit of—Buildings—Time limited for commencement of work - 468
See BUILDING.

PLEADING.
See under PRACTICE.

POLICE—*Pension*—"*Approved Service*"—*Continuity of Service*—*Police Act*, 1890 (53 & 54 *Vict. c.* 45), *s.* 1.

By s. 1 (*a*) of the Police Act, 1890, a constable in a police force who has completed not less than twenty-five years' approved service is entitled to a pension on retirement. A constable served in the same police force for three periods amounting in the whole to upwards of twenty-five years; between the periods were breaks of about four months and two months respectively, caused in each instance by the constable's resignation from, and reinstatement in, the force:—

Held, that the period of approved service to count for a pension must be continuous service, and that the constable was therefore not entitled to a pension on retirement. GARBUTT *v.* DURHAM JOINT COMMITTEE - - - Div. Ct. 522

POLICY.
See under INSURANCE, LIFE, and INSURANCE, MARINE.

POOR-RATES.
See under RATES.

POOR LAW—*Appeal against Poor-rate*—*Assessment Committee as Respondents — Consent of Guardians*—*Notice of Meeting of Guardians*—*Union Assessment Committee Amendment Act*, 1864 (27 & 28 *Vict. c.* 39), *s.* 2—*Divided Parishes and Poor Law Amendment Act*, 1882 (45 & 46 *Vict. c.* 58), *s.* 12.

Sect. 12 of the Divided Parishes and Poor Law Amendment Act, 1882, which enacts that where, under the Poor Law Amendment Act, 1834, or any of the Acts amending the same, the consent in writing of a majority of the guardians of a union is required it shall be deemed a sufficient compliance with such requirement if a resolution giving consent is passed at a meeting of the guardians, of which meeting, and of the business to be transacted thereat, not less than fourteen days' notice shall be given to each guardian, is confined to cases of statutory enactments by which the consent in writing of a majority of the guardians of a union is required, and a fourteen days' notice is not necessary of a meeting at which the consent of the guardians is to be asked, under s. 2 of the Union Assessment Committee Amendment Act, 1864, to the appearance of the assessment committee as respondents to an appeal against a poor-rate. SMITH *v.* LEIGH UNION - - - - C. A. 484

PRACTICE—*Appeal*—*Reference of Action to Master*—*Rules of Supreme Court, Order XIV., r.* 7.

Where an action is referred to a master under Order XIV., r. 7, an appeal does not lie from his decision direct to the Court of Appeal.

Query, whether in such a case an appeal will lie to the Divisional Court. FRASER *v.* FRASER C. A. 56

PRACTICE—*continued.*

2. —— *Costs*—*Procedure under Order XIV.*—*Judgment for* 20*l. and upwards but less than* 50*l.*—*Reference of Action to Master*—*Discretion to give Costs on High Court Scale*—*Rules of Supreme Court, Order XIV., r.* 7—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 116.

Upon an application for judgment under Order XIV. the action was referred to a master under rule 7, and in the result he made an order, after the expiration of twenty-one days from service of the writ, that the plaintiff be at liberty to sign final judgment for a sum exceeding 20*l.* but less than 50*l.*, with costs of the action, which he fixed at a specific sum, and with the costs of the reference and award to be taxed on the High Court scale, and he certified that the action was fit to be brought in the High Court. On an appeal from this order to the judge at chambers:—

Held, that, as there had been no order extending the time—twenty-one days from the service of the writ—within which by the proviso to s. 116 of the County Courts Act, 1888, a plaintiff who obtains judgment under Order XIV. for upwards of 20*l.* is entitled to costs on the High Court scale, the plaintiff was only entitled to costs of the action on the county court scale; but that, with respect to costs of the reference and award, the master must be deemed to be an arbitrator with the same power as an ordinary arbitrator has of awarding and certifying for costs, and therefore that his order in this respect was right.

Per Phillimore J.: The power to extend the time given by the proviso to s. 116 of the County Courts Act, 1888, is given only to a judge of the High Court. HAYCOCKS, LIMITED *v.* MULHOLLAND - - - - Phillimore J. 145

3. —— *Discovery*—*Marine Insurance*—*Ship's Papers*—*Action by Underwriters*—*Recovery of Money overpaid*—*Right of Plaintiffs to Full Discovery.*

The plaintiffs, who were underwriters of a policy of marine insurance entered into by them with the defendants, paid a sum of money in respect of a claim arising out of the policy. They subsequently brought this action to recover back a part of the money upon the ground that, owing to a fraudulent misrepresentation of the defendants as to the amount expended upon the repairs of the ship insured, the plaintiffs had paid to the defendants a sum in excess of the amount actually expended upon the repairs. On an application by the plaintiffs for discovery:—

Held, that the plaintiffs were entitled to full discovery by the defendants, including the obligation to produce, or to give on oath reasons explaining their inability to produce, documents which were not in their custody, or which were in their custody as agents for other persons, and to give such information as to documents not produced as they could obtain by reasonable exertions on their part. BOULTON *v.* HOULDER BROTHERS & CO. - - - C. A. 784

4. —— *Examination of Officer of Company*—*Officer who has retired*—*Execution*—*Judgment against Company — Rules of Supreme Court, Order XLII., r.* 32.

Where a judgment or order is obtained against

PRACTICE—*continued.*
a company for the recovery or payment of money, an order may be made under Order XLII., r. 32, upon a person who has been a director of a company, but has ceased to be so at the time of the making of the order, to attend to be examined as to debts owing to the company, and whether the company has property or means of satisfying the judgment or order. SOCIÉTÉ GÉNÉRALE DU COMMERCE ET DE L'INDUSTRIE EN FRANCE *v.* JOHANN MARIA FARINA & Co. - C. A. 794

5. —— *Review, Action to — Order of High Court—Error in Law apparent on face of Order —Jurisdiction of High Court to review.*
Since the passing of the Judicature Act, 1873, the High Court has no jurisdiction to review its own order, in an action brought to review the order on the ground of error in law, apparent on the face of it, the remedy of the party complaining being by appeal to the Court of Appeal. CHARLES BRIGHT & Co. *v.* SELLAR - C. A. 6

—— Appeal — Workmen's compensation — Refusal to direct review of taxation of costs - - - - - 358
See EMPLOYER AND WORKMAN. 15.

—— Appeal against poor-rate—Consent of guardians - - - - 484
See POOR LAW.

—— Appeal from county court — Right to appeal on leave to Court of Appeal 820
See DISTRESS. 2.

—— Assignment of right to compensation—Right of assignee to sue in own name
See LANDS CLAUSES ACTS. 2. 277

—— Costs.
See under COSTS.

—— Costs—County courts—Payment into court —Judgment for defendant - 535
See COUNTY COURT. 1.

—— Costs—Cross-judgment—Payment of judgment debt into court—Solicitor's lien for costs - - - - 399
See COUNTY COURT. 3.

—— Costs—Distress, Reasonable costs of selling —Poor-rate - - - 811
See DISTRESS. 1.

—— "Costs of execution"—High bailiff—Possession money - - - 68
See COUNTY COURT. 2.

—— Court of Appeal, Rehearing before—Bankrupt—Discharge, Refusal of - 106
See BANKRUPTCY. 2.

—— Judge or jury, Question whether for—Covenant—Reasonableness of restriction 45
See RESTRAINT OF TRADE.

—— Pleading—Libel—Payment into court—Denial of liability - - - 292
See HUSBAND AND WIFE. 1.

—— Service — Notice to treat — Compulsory powers - - - - 1
See LANDS CLAUSES ACTS. 3.

PREMIUMS—Recovery of—Contract—Illegality —Policy on life of another - 558
See INSURANCE, LIFE. 1.

PRESCRIPTION — Easement — Enjoyment as between tenants—Unity of ownership
See WAY, RIGHT OF. 457

PRINCIPAL AND AGENT—Share certificate issued by secretary—Forgery—Scope of employment - - - 650
See COMPANY.

PRIVATE INTERNATIONAL LAW.
See under CONFLICT OF LAWS.

PRIVATE STREETS.
See under STREETS.

PUBLIC HEALTH — Nuisance in respect of drains—Order to abate—Necessity for signature by two justices - - 798
See NUISANCE. 2.

—— Owner—Duty to fence—Public well in shaft of abandoned mine—Vested in local authority - - - 382
See MINE.

—— Sporting Rights, Rateability of - 678
See RATES. 2.

PUBLIC HEALTH (LONDON)—Chimney of private dwelling-house—Club—Nuisance —Black smoke - - - 208
See NUISANCE. 1.

—— Covenant by tenant to pay outgoings—Yearly tenancy—Defective drain 13
See LANDLORD AND TENANT. 4.

—— Land tax—Public underground lavatories
See LAND TAX. 19

—— Lodging-house — Lime-washing — Validity of by-law - - - - 615
See LONDON. 3.

—— Lodging-house—Water-closet accommodation—Validity of by-law - - 610
See LONDON. 4.

—— Nuisance—Chimney sending forth black smoke—Funnel of steam-tug - 804
See LONDON. 5.

PUBLIC-HOUSE—Licensing Acts.
See under LICENSING ACTS.

PUBLIC UNDERGROUND LAVATORIES—Land tax - - - - - 19
See LAND TAX.

QUARTER SESSIONS — Licensing appeals — Jurisdiction—Costs of licensing justices - - - - - 545
See LICENSING ACTS. 1.

QUIT—Notice to—Tenancy at yearly rent—Three months' notice—Expiration of notice - - - - 444
See LANDLORD AND TENANT. 2.

RAILWAY—*Contract of Carriage—Conveyance of Goods by Passenger Train — Agreement for Carriage in absence of Obligation—Collection and Delivery—Inclusive Charge—Equality Clause of Special Act—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 90.
A schedule of the statutory maximum rates and charges authorized to be taken by a railway company for the conveyance of goods contained a provision that the company should not be

RAILWAY—*continued.*
under obligation to carry non-perishable goods by passenger train. A section of a special Act of the company provided that all tolls should be charged equally to all persons. The company announced to the public their willingness to carry tailors' clothing by passenger train at a "collected and delivered" rate specified in a scale of charges which they published. The plaintiffs, who were common carriers at Bristol, sent parcels of tailors' clothing from Bristol to Southampton by the company's passenger train, having themselves collected the goods at Bristol and handed them over to the company at their passenger station. The plaintiffs paid to the company, under protest, the scale charge; and brought an action against them for money had and received, claiming to be entitled to a rebate from the defendants in respect of the collection of the goods at Bristol:—

Held, that, as the company were under no statutory obligation to carry the goods by passenger train, the plaintiffs were not entitled to any rebate.

Judgment of the King's Bench Division, [1903] 1 K. B. 741, affirmed. STONE & Co. *v.* MIDLAND RAILWAY COMPANY - **C. A. 669**

—— Compulsory powers — Notice to treat — Service - - - - **1**
See LANDS CLAUSES ACTS. 3.

RATES—*Recovery of—Illegal Distress—Liability of Overseers for Act of Assistant Overseer.*

A justices' warrant of distress for rates, which was addressed in the statutory form to the overseers and constables, was handed by one of the overseers to the assistant overseer, who was empowered by the terms of his appointment to perform all the duties of an overseer. The assistant overseer, purporting to act in the execution of the warrant, was guilty of an illegal and excessive distress:—

Held, that the overseers were not responsible for the act of the assistant overseer. BAKER *v.* WICKS - - - **Lord Alverstone C.J. 743**

2. —— *Sporting Rights, Rateability of — Assessment in Proportion of One-fourth of net Annual Value—General District Rate—Rating Act*, 1874 (37 & 38 *Vict. c.* 54), *s.* 6—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 211.

Where a right of sporting over land within the district of an urban sanitary authority is severed from the occupation of the land, and is let, s. 211 of the Public Health Act, 1875, does not apply to entitle the lessee of that right to be assessed in respect of the same to the general district rate in the proportion of one-fourth part only of the net annual value thereof. ALTON URBAN DISTRICT COUNCIL *v.* SPICER **Div. Ct. 678**

3. —— *Tender of part of Rate—Obligation of Magistrate to issue Distress Warrant for whole—Poor-rate.*

A rate having been duly made in a parish, a ratepayer tendered to the overseers a portion of the sum that he was liable to pay in respect of the rate, but refused to pay the balance. The overseers refused to accept part payment of the rate, and preferred a complaint before the magistrate against the ratepayer for a refusal to pay the rate. At the hearing the ratepayer again

RATES—*continued.*
tendered in Court a portion of the sum due from him, which was again refused; whereupon the magistrate refused to issue a distress warrant for more than the amount of the balance:— .

Held, that under the circumstances the magistrate was not bound to issue his distress warrant for the whole amount of the rate. THE KING *v.* GILLESPIE - - - - **Div. Ct. 174**

—— Appeal against poor-rate — Consent of guardians - - - - **484**
See POOR LAW.

—— Distress — Poor-rate—Reasonable costs of selling distress - - - **811**
See DISTRESS. 1.

—— Water rate—Equality of charge—Maximum charge - - - - **299**
See WATER. 1.

RECEIVING ORDER — Adjudication—Debtor's own petition—Committal order, Evasion of - - - - - **585**
See BANKRUPTCY. 6.

—— Bankruptcy notice—Address of creditor **572**
See BANKRUPTCY. 1.

REDEMPTION—Equity of—Sale—Jurisdiction
See COUNTY COURT. 4. **827**

RE-ENTRY—Covenant not to assign or sublet—Covenant to be "performed" - **698**
See LANDLORD AND TENANT. 5.

REFERENCE—Action to master—Appeal **56**
See PRACTICE. 1.

REGISTRATION — Workmen's Compensation—Agreement — Registration of memorandum - - - - **503**
See EMPLOYER AND WORKMAN. 4.

REGISTRATION OF VOTERS.
See under PARLIAMENT.

REMITTAL—Action to county court—Reduction by amendment of writ - - **295**
See COUNTY COURT. 5.

REMOTENESS — Damage — Slander — Special damage - - - - **138**
See DEFAMATION.

RENEWAL—Licence—Discretion of justices—Many public-houses in locality - **430**
See LICENSING ACTS. 2.

RENT—Lease—Forfeiture for non-payment of rent—Underlessee—Relief - **601**
See LANDLORD AND TENANT. 1.

RENT-CHARGE—Tithe.
See under TITHE.

REPAIR — Highway — Extraordinary traffic — Locomotives Act—Costs - - **62**
See HIGHWAY. 2.

REPRESENTATION OF THE PEOPLE ACT.
See Cases under PARLIAMENT.

RES JUDICATA — Workmen's compensation—Change of circumstances - - **235**
See EMPLOYER AND WORKMAN. 8.

RESTRAINT OF TRADE—*Covenant not to carry on a Business—Reasonableness of Restriction—Question, whether for Judge or Jury.*

The question whether the terms of a covenant

RESTRAINT OF TRADE—*continued.*
not to carry on a business go beyond what is reasonably necessary for the protection of the covenantee under the circumstances of the case is not a question for a jury, but is for the judge. DOWDEN & POOK, LIMITED *v.* POOK - **C. A. 45**

RESTRAINT ON ANTICIPATION — Married woman—Separate property—Judgment —Execution - - - **28, 35**
See EMPLOYER AND WORKMAN. 8.

REVENUE—*Estate Duty — Exemption — Settlement of Personal Property—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 21, *sub-s.* 1.

By the Finance Act, 1894, s. 21, sub-s. 1, "Estate duty shall not be payable on the death of a deceased person in respect of personal property settled by a will or disposition made by a person dying before the commencement of this part of the Act, in respect of which property" probate duty (among other specified duties) "has been paid."

Under the will of a testator who died in 1849, his residuary personal estate became vested in trustees upon trust to invest it in land and to hold the same in trust for two persons in succession for life, with remainder to the defendant in tail male. Probate duty was paid on the testator's personalty. On the death of the second tenant for life in 1900, estate duty was claimed in respect of the land, then subject to the trusts of the will, which represented the residuary personal estate of the testator:—

Held, that estate duty was payable; that s. 21, sub-s. 1, did not apply, because at the date of the death in respect of which estate duty was claimed the settled property was not personal property. ATTORNEY-GENERAL *v.* EARL OF LONDESBOROUGH - - - Channell J. 749

2. —— *Estate Duty—Policy of Life Insurance —Marriage Settlement — "Interest purchased or provided by Deceased" — Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2, *sub-s.* 1 (*d*)—*Life Assurance Act*, 1774 (14 *Geo.* 3, *c.* 48).

By s. 1 of the Finance Act, 1894, estate duty is granted upon all property which passes on the death of a person dying after the commencement of the Act. By s. 2, "property passing on the death" is to be deemed to include (s. 2, sub-s. 1 (*d*)) "any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased."

A father effected a policy of insurance in his own name on the life of his son, then aged eleven, to commence at the age of twenty-one, upon which ten yearly premiums only were to be paid; the father, who had no insurable interest in his son's life, paid all the premiums. After the son had attained the age of twenty-one, the father, with the approbation of the son and the son's intended wife, assigned to the trustees of the son's marriage settlement the policy of insurance and all moneys assured or to become payable under it upon trust after the son's death to invest the insurance moneys and pay the income to the wife for life. After the death of the son (who survived his father) the

REVENUE—*continued.*
insurance moneys were paid by the insurance company to the trustees, who invested them in accordance with the trusts of the settlement:—

Held, that, assuming that as between the father and the insurance company the policy was illegal and void under 14 Geo. 3, c. 48, for want of insurable interest, and that the insurance moneys were not legally recoverable, yet, the money having been in fact paid by the insurance company, the liability to estate duty was not affected by the illegality of the contract of insurance.

Worthington v. *Curtis*, (1875) 1 Ch. D. 419, followed.

Held, also, that the expression "interest" in s. 2, sub-s. 1 (*d*), of the Finance Act, 1894, covers money paid under a policy of insurance on the life of the deceased.

Attorney-General v. *Robinson*, (1901) 2 I. R. 67, approved.

But *held*, further, that the sum paid under the insurance policy on the son's death was not an interest purchased or provided by the son in concert or by arrangement with his father within the meaning of s. 2, sub-s. 1 (*d*), of the Finance Act, 1894, and that on the death of the son estate duty was not payable in respect of that sum.

Judgment of Ridley J., [1903] 2 K. B. 64, reversed. ATTORNEY-GENERAL *v.* MURRAY **C. A. 165**

3. —— *Income Tax—Sched. D—Bank—Purchase of Business of another Bank—Establishment of Branch—Succession to Business—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Sched. D, First and Second Cases, Rule* 4.

The respondents, a bank with a large capital, whose head office was in London, and having numerous branches in England and Wales, purchased in 1899 the business and premises and other assets of the County of Stafford Bank, which had a comparatively small capital, and carried on business only at Wolverhampton. The respondents then for the first time opened a branch at that place upon the premises so purchased, and there carried on business with the manager and staff previously employed by the County of Stafford Bank. The profits and expenses of the business so carried on at Wolverhampton by the respondents were merged in those of their concern as a whole, and there were no means of ascertaining whether there were any profits, or the proportion of increase or decrease, if any, in the profits of the respondents' bank, which had arisen from the business purchased as aforesaid. In the three years respectively, subsequent to 1899, the respondents, in computing the average of their profits under the First Rule of the First Case in s. 100, Sched. D, of the Income Tax Act, 1842, did not include any profits earned by the County of Stafford Bank. Additional assessments were made upon them so as to include such profits, on the ground that there had been a succession by them to the business of the County of Stafford Bank within the meaning of the Fourth Rule applicable to the First and Second Cases in Sched. D.:—

Held (reversing the judgment of Ridley J.,

REVENUE—*continued.*

[1903] 2 K. B. 249), that there had been such a succession, and therefore the additional assessments were rightly made. BELL *v.* NATIONAL PROVINCIAL BANK OF ENGLAND, LIMITED **C. A. 149**

4. —— *Licence—Assessed Taxes—Stable-boy—Apprentice—"Male Servant"—Revenue Act*, 1869 (32 & 33 *Vict. c.* 14), *s.* 19, *sub-s.* 3.

The employer of an apprentice under a bonâ fide contract of apprenticeship is not required to take out a licence for the apprentice as a male servant under s. 18 of the Revenue Act, 1869, even though the apprentice is employed in one of the capacities specified in the definition of "male servant" in s. 19, sub-s. 3, of that Act. HORAN *v.* HAYHOE - - - **Div. Ct. 288**

5. —— *Stamp Duty — Company—Consolidation of Debenture Stock—Issue of Loan Capital—Finance Act*, 1899 (62 & 63 *Vict. c.* 9), *s.* 8.

By the special Act of the defendant company, three different debenture stocks of the company, being respectively 3 per cent., 4 per cent., and 4½ per cent. stock, and amounting to 411,852*l.*, were extinguished, and in lieu thereof there was created a new 3 per cent. debenture stock. The holders of the original 3 per cent. stock received the same nominal amount of the new stock, and the holders of the 4 per cent. and 4½ per cent. stocks received new stock to such nominal amount as at the rate of 3 per cent. would yield to the holder the same amount as was payable in respect of the stock previously held. The amount of the new debenture stock requisite to carry out the Act was 529,136*l.*, and stock to this amount was inscribed in the names of the persons entitled thereto, and certificates were issued in exchange for the old certificates:—

Held, that the new debenture stock was loan capital which the company had proposed to issue within the meaning of s. 8 of the Finance Act, 1899; and that they were bound to deliver the statement of the amount proposed to be secured by the issue, and to pay the stamp duty imposed by that section upon such a statement.

Judgment of Ridley J., [1903] 2 K. B. 86, reversed. ATTORNEY-GENERAL *v.* REGENT'S CANAL AND DOCK COMPANY - - - **C. A. 263**

6. —— *Stamp Duty—"Marketable Security"—Debenture Bond—"Given in Substitution for a like Security"—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *Sched. I.*

The appellant company, incorporated under the laws of Victoria, was formed to take over the assets and liabilities of two existing companies, one of which was a company registered in England having an issue of debentures. The holders of these debentures by agreement delivered them up, and accepted in lieu thereof debentures of an equivalent amount issued by the appellant company:—

Held, that the debentures of the appellant company were not "given in substitution for a like security" within the meaning of sub-head 4 of the heading "Marketable Securities" in the First Schedule to the Stamp Act, 1891, and were therefore liable to bear stamp duty to the full amount. MOUNT LYELL MINING AND RAILWAY COMPANY *v.* COMMISSIONERS OF INLAND REVENUE **Channell J. 757**

REVENUE—*continued.*

7. —— *Succession Duty—Tenant for Life—Remainder in Tail—Disentailing Deed—Appointment to Purchaser in Fee—Alienation—Succession derived from Alienee—Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 15.

In 1868 the tenant for life of real estate and the tenant in tail in remainder joined in the execution of a disentailing deed by which the property stood limited to such uses as they should by deed jointly appoint. In 1870 they sold a portion of the land to a purchaser, to whom they jointly appointed and conveyed it. In 1874 the purchaser died, having devised the land to his wife, who died in 1888, after devising it to her daughter; and the daughter paid succession duty on the value of her interest considered as an annuity. In 1899 the tenant for life died;—

Held, affirming the the judgment of Ridley J., [1903] 2 K. B. 71, that upon the death of the tenant for life succession duty in respect of the succession of the tenant in tail became payable, notwithstanding the alienation of the succession and the disposition of the property by the alienee: and that the duty must be calculated on the value of the interest considered as an annuity by reference to the daughter's life.

Decision on construction of s. 15 of the Succession Duty Act, 1853, in *In re Cooper and Allen to Harlech*, (1876) 4 Ch. D. 802, overruled.

Solicitor-General v. *Law Reversionary Interest Society*, (1873) L. R. 8 Ex. 233, followed. ATTORNEY-GENERAL *v.* DUKE OF NORTHUMBERLAND - - - - - **C. A. 762**

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SALE OF GOODS—*Implied Condition—Breach—Measure of Damages—Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *ss.* 11, 13, 14 *sub-s.* 2, 53 *sub-s.* 2.

The defendants contracted to sell by description to the plaintiffs sulphuric acid, commercially free from arsenic. The plaintiffs did not make known to the defendants, either expressly or by implication, the purpose for which they required the acid. In breach of the implied condition that the acid should correspond with the description in the contract, the defendants supplied to the plaintiffs sulphuric acid which was not commercially free from arsenic. The plaintiffs by the exercise of ordinary care might have discovered the presence of arsenic in the acid; but they did not do so, and, in ignorance of the fact, used the acid in the manufacture of brewing sugar in the shape of invert and glucose, which they sold to brewers who used it in the brewing of beer. The beer thus made was rendered poisonous, and the brewers suffered loss in respect of which the plaintiffs were liable to them. The plaintiffs also lost the price of the acid, which was rendered worthless to them, and the value of other goods spoilt through being mixed with the acid; and the goodwill of their business was damaged:—

Held, that the plaintiffs were entitled to recover from the defendants the price of the acid and the value of the goods spoilt, but not the damages payable by the plaintiffs to the brewers or the damage to the goodwill of the plaintiffs' business. BOSTOCK & CO., LIMITED *v.* NICHOLSON & SONS, LIMITED - - - Bruce J. 725

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—— Settlor's own property—Limitation to settlor for life determinable on bankruptcy—Validity - - - - - 134
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—— Nuisance in respect of drains—Order to abate—Necessity for signature by two justices - - - - - 798
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—— Outgoings—Tenancy for three years—Liability of tenant - - - 447
See LANDLORD AND TENANT. 3.

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See under COMPANY.

SHIPPING—*Bill of Lading—Exceptions—Warranty of Seaworthiness, how far excluded.*

In a bill of lading, under which frozen meat was shipped for carriage from Melbourne to London, were two exception clauses, the first of which provided that "Neither the steamer, nor her owners, nor her charterers shall be accountable for the condition of goods shipped under this bill of lading, nor for any loss or damage thereto, whether arising from failure or breakdown of machinery, insulation, or other appliances, refrigerating or otherwise, or from any other cause whatsoever, whether arising from a defect existing at the commencement of the voyage or at the time of shipment of the goods or not, nor for detention; nor for the consequence of any act, neglect, default, or error of judgment of the master, officers, engineers, refrigerating engineers, crew, or other persons in the service of the owners or charterers, nor from any other cause whatsoever." The second clause, after specifying certain matters, such as the act of God, the King's enemies, restraints of princes, &c., proceeded as follows: "and loss or damage resulting therefrom, or from any of the following causes or perils, are

SHIPPING—*continued.*

excepted, namely, insufficiency in packing or in strength of packages, loss or damage from coaling on voyage, rust, vermin . . . . or any other causes beyond the control of the owners or charterers, or by or from any accidents to or defects latent or otherwise in hull, tackle, boilers, or machinery, refrigerating or otherwise, or their appurtenances (whether or not existing at the time of the goods being loaded, or the commencement of the voyage), or insufficiency of coals at the commencement or any stage of the voyage, if reasonable means have been taken to provide against such defects and unseaworthiness."

The ship on a previous voyage had carried horses, and a large quantity of carbolic acid had been used to disinfect her 'tween-decks and holds before the meat was shipped. When the ship arrived at her destination the meat was tainted with carbolic acid. In an action by indorsee of the bill of lading against the shipowners in respect of the damage to the meat, Walton J. at the trial found that the damage arose through the ship not being in a fit condition for the carriage of the meat at the time of the shipment, by reason of her being tainted with carbolic acid, and that, if proper skill, care, and attention had been used in cleansing and preparing the ship before the meat was shipped, the damage would not have occurred, but he held that the first of the above-mentioned exception clauses relieved the defendants from liability:—

Held, reversing his decision, that the terms of the bill of lading did not exempt the defendants from liability for the damage caused by the unfitness of the ship to carry the goods shipped. BORTHWICK *v.* ELDERSLIE STEAMSHIP COMPANY C. A. 319

2. —— *Charterparty — Freight at Rate per Ton of Gross Weight Shipped—"Payable on right and true Delivery of Cargo"—Loss of Part of Cargo—Lump Sum Freight—Freight on Cargo delivered—Bill of Lading Freight collected by Shipowner—Difference between Freight collected and Freight due for Cargo delivered—Recovery of Balance by Charterer.*

By a charterparty a cargo of sugar in bags was to be loaded at a named port, and the ship so loaded was to proceed to another named port and there deliver the cargo "agreeably to bills of lading on being paid freight in full of all port charges . . . . at the rate of 10*s.* 6*d.* per ton of 20 cwt. gross weight shipped payable on right and true delivery of the cargo." Charterers' liability was to cease "when cargo is shipped and bills of lading signed, provided all the conditions called for in this charter have been fulfilled, but vessel to have a lien on the cargo for freight, dead freight, and demurrage." Any difference between the charterparty and bills of lading freight was to be settled at the port of loading on clearance of the vessel if required by the master. The amount due under this clause was ascertained at the port of loading, and paid by the charterers to the shipowners. The vessel loaded a full cargo, but on the voyage she grounded and a portion of the cargo was lost. The remainder was delivered at the port of discharge, and the bills of lading freight

SHIPPING—*continued.*

on the whole cargo shipped was collected by the shipowners. In an action by the charterers to recover, as money received to their use, the difference between the freight so collected by the shipowners and the amount due to them under the charterparty in respect of the cargo delivered:—

Held, by Lord Alverstone C.J. and Collins M.R., Romer L.J. dissenting, affirming the judgment of Walton J., that under the charterparty the shipowners were not entitled to a lump sum freight, and that the balance of freight in their hands could be recovered from them by the charterers. LONDON TRANSPORT COMPANY, LIMITED *v.* TRECHMANN BROTHERS - C. A. 635

3. —— *Seamen — Shipwreck — "Distressed Seamen"—Expenses of Maintenance and Passage Home—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 190, 191, 193—*Merchant Shipping (Mercantile Marine Fund) Act*, 1898 (61 & 62 *Vict. c.* 44), *s.* 4.

A seaman was shipwrecked abroad, and was there paid his wages up to the time of the shipwreck. The amount so paid was more than sufficient to maintain him and to provide him with a passage home. He was maintained and provided with a passage home by one of the authorities referred to in s. 191 of the Merchant Shipping Act, 1894. In an action by the Board of Trade to recover the expenses so incurred, an account of those expenses was produced and proof of payment thereof by the Board of Trade was given:—

Held, that the question whether a seaman discharged or left behind or shipwrecked from any British ship, or from any of His Majesty's ships, is in distress in any place abroad, is a question of fact, and the receipt by him of wages sufficient to maintain him and pay his passage home does not necessarily shew that he was not a distressed seaman within s. 191 of the Act:

Held, also, without deciding whether the production of the account of the expenses and proof of payment thereof by or on behalf of the Board of Trade are, by s. 193, sub-s. 3, of the Act, made conclusive evidence that the expenses were incurred or repaid under the Act by or on behalf of the Crown, that the Board, in the absence of evidence that the seaman was not a distressed seaman within the Act, were entitled to recover.

Decision of Bigham J., [1903] 2 K. B. 324, in favour of the plaintiffs, affirmed. BOARD OF TRADE *v.* SAILING SHIP GLENPARK, LIMITED C. A. 682

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2 Edw. 7, c. 28, s. 20—*Licensing* - - 545
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STREETS — *Private Streets Works Act*, 1892 (55 & 56 *Vict. c.* 57), *ss.* 5, 7—*Objections to proposed Works—Grounds—Not a Street within the Act—Local Government—Highway repairable by Inhabitants at large—Evidence—Admissibility.*

By s. 7 of the Private Streets Works Act, 1892, the owner of premises liable to be charged with any part of the cost of executing works under the Act may by written notice to the urban authority object to the proposed works on the following, amongst other, grounds: (*a*) that an alleged street is not a street within the meaning of the Act; (*b*) that a street is a highway repairable by the inhabitants at large. By s. 5 the expression "street" in the Act means a street as defined by the Public Health Acts, and not being a highway repairable by the inhabitants at large:—

Held, that where the ground of objection was that the alleged street was not a street within the meaning of the Act, evidence was admissible to prove that the street was a highway repairable by the inhabitants at large. CAREY *v.* BEXHILL CORPORATION - - Div. Ct. 142

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TITHE—*Tithe Rent-charge—Agreement by Tenant to repay amount of to Landlord—Validity of Agreement—Tithe Act*, 1891 (54 *Vict. c.* 8), *s.* 1, *sub-s.* 1.

Sect. 1, sub-s. 1, of the Tithe Act, 1891, which provides that "any contract made between an occupier and owner of lands after the passing of this Act for the payment of the tithe rent-charge by the occupier shall be void," prohibits not only a contract by the occupier to pay the tithe rent-charge directly to the tithe owner, but also a contract to reimburse the landlord such sums as shall be paid by him for tithe rent-charge. LORD LUDLOW *v.* PIKE - - Channell J. 531

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WARRANTY—Bill of lading — Exceptions — Warranty of seaworthiness, how far excluded - - - - 319
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—— Not to commit suicide—Condition precedent—Policy for benefit of third party
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WATER—*Rate—Equality of Charge—Obligation to charge all Consumers at an equal Rate—Maximum Charge.*

The undertaking and powers of a water company were by an Act of 1884 transferred to a municipal corporation. By s. 49 of the company's special Act passed in 1861, the company were empowered to charge for a supply of water for domestic use rates "not exceeding" certain amounts graduated according to the value of the premises, and by s. 59 of the Act it was provided that "the company may from time to time supply any persons with water for any purpose for which such supply is required, for such remuneration, and upon such terms and conditions, as shall be agreed upon between the company and the person desirous of such supply of water, under a special agreement." By s. 36 of the before-mentioned Act of 1884, s. 49 of the Act of 1861 was repealed, and the corporation were empowered to "charge for the supply of water for domestic use to any dwelling-house a sum not exceeding 7½ per centum per annum on the net rateable value of such dwelling-house, as ascertained by the valuation list in force at the commencement of the quarter during which the water rate becomes payable." There was no express provision in either of the before-mentioned Acts requiring equality of rating in respect of the charge made for water to consumers.

The corporation charged to consumers in respect of water supply for domestic purposes in

WATER—*continued.*
part of their district at the rate of 7½ per cent. and in the remainder of the district at the rate of 5 per cent. upon the rateable value of their respective dwelling-houses. In an action brought to recover the sum charged to a consumer for water at the higher rate:—

Held, reversing the judgment of Bigham J., that no implication arose from s. 36 of the Act of 1884 that the corporation were bound to charge for water at an equal rate in the pound to all consumers, and therefore the fact that they had not done so was no defence to the action. NORTHAMPTON CORPORATION *v.* ELLEN - **C. A. 299**

2. —— *Waterworks — Land compulsorily taken—Compensation—Special adaptability.*

Where land is compulsorily taken for the purpose of making a reservoir, the fact that the land has peculiar natural advantages for supplying a district or area, apart from any value created or enhanced by the scheme or Act for appropriating the water to a particular local authority, may be taken into consideration in the assessment of compensation; and it is not necessary that it should be proved that the land could be similarly used by other specified local authorities.

Judgment of Wright J., [1903] 1 K. B. 574, affirmed. *In re* GOUGH AND ASPATRIA, SILLOTH AND DISTRICT JOINT WATER BOARD **C. A. 417**

—— Duty to fence—Owner—Public well in shaft of abandoned mine — Vested in local authority - - - - **882**
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WATER-CLOSETS — Accommodation — Validity of by-law - - - - **610**
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WAY, RIGHT OF—*Prescription—Enjoyment as between Tenants—Dominant and Servient Tenements—Unity of Ownership—Forty Years' User—Easement—Prescription Act*, 1832 (2 & 3 *Will.* 4, *c.* 71), *s.* 2.

An easement, such as a right of way, cannot, under s. 2 of the Prescription Act, 1832, be acquired by a tenant by user over land occupied by another tenant under the same landlord, even if that user has existed for the period of forty years mentioned in the section.

Dictum in *Harris* v. *De Pinna*, (1885-6) 33 Ch. D. 238, overruled. KILGOUR *v.* GADDES **C. A. 457**

WEIGHTS AND MEASURES—*Weighing Machine—Weight indicated exceeding Weight of Article sold—Acquiescence of Purchaser—"False or Unjust"—Weights and Measures Act*, 1878 (41 & 42 *Vict. c.* 49), *s.* 25.

The respondents, who were wholesale tea merchants, were charged under s. 25 of the Weights and Measures Act, 1878, with using for trade two scales which were false or unjust. One of the scales (which were used for weighing tea) had a small metal disc affixed by wire to the arm of the scale on which the scoop for weighing the tea was placed, the disc being approximately equivalent in weight to the paper bag in which each quantity of tea was to be put; the effect was to make the quantity of tea required to turn the scale less by the weight of the metal disc than the weight on the opposite side of the scale. The second machine had, instead of a metal disc, a paper bag placed under the scoop in which the tea was placed for weighing; the effect was the same. After being weighed the tea was placed in paper bags. Tea was so weighed out only for retail dealers who requested to be supplied with it so packed, and who supplied the paper bags in which it was to be packed to the respondents; each of the bags had printed on it an intimation that the weight of the paper was included. Directions were given by the respondents to their servants not to use scales with a metal disc or paper bag attached for any customers other than such retail dealers:—

Held, that the scales, being kept in a condition in which they could not weigh accurately that which was put in them to be weighed, were "false or unjust" within the meaning of the section, notwithstanding the acquiescence of the purchasers in the mode of weighing. LONDON COUNTY COUNCIL *v.* PAYNE & Co. - **Div. Ct. 194**

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WHARF—Factory—Workmen's compensation
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